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FIRST CIRCUIT COURT
STATE OF HAWAII
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA, Plaintiffs, vs. CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission; LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission; HONOLULU ETHICS COMMISSION; and THE CITY AND COUNTY OF HONOLULU, Defendants.	CIVIL NO. 16-1-1166-6 GWBC (Non-Motor Vehicle Tort) DEFENDANT LETHA A.S. DECAIRES' **REPLY** TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO LETHA A.S. DECAIRES, INDIVIDUALLY AND AS INVESTIGATOR FOR THE HONOLULU ETHICS COMMISSION'S MOTION (A) FOR MORE DEFINITE STATEMENT, (B) TO STRIKE, AND (C) TO JOIN DEFENDANTS HONOLULU ETHICS COMMISSION AND CITY AND COUNTY OF HONOLULU'S MOTION FOR MORE DEFINITE STATEMENT AND MOTION TO STRIKE; DECLARATION OF COUNSEL; EXHIBITS "1" – "8"; CERTIFICATE OF SERVICE **HEARING** **DATE:** November 18, 2016 **TIME:** 9:30 a.m. **JUDGE:** Hon. Gary W.B. Chang No Trial Date Set

DEFENDANT LETHA A.S. DECAIRES' **REPLY** TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO LETHA A.S. DECAIRES, INDIVIDUALLY AND AS INVESTIGATOR FOR THE HONOLULU ETHICS COMMISSION'S MOTION (A) FOR MORE DEFINITE STATEMENT, (B) TO STRIKE, AND (C) TO JOIN DEFENDANTS HONOLULU ETHICS COMMISSION AND CITY AND COUNTY OF HONOLULU'S MOTION FOR MORE DEFINITE STATEMENT AND MOTION TO STRIKE

The Defendants in this case have filed the following three Motions: (1) Defendant LETHA A.S. DECAIRES ("**DeCaires**")' above-referenced Motion for More Definite Statement and to Strike ("**DeCaires Motion**" (*Exhibit "1"*)); (2) Defendants HONOLULU ETHICS COMMISSION AND CITY AND COUNTY OF HONOLULU (collectively "**C&C Defendants**")' Motion for More Definite Statement and Motion to Strike ("**C&C Motion**" (*Exhibit "2"*)); and (3) Defendant CHARLES W. TOTTO ("**Totto**")'s Motion to Strike Verified Complaint and/or Portions Thereof ("**Totto Motion**" (*Exhibit "3"*)) (collectively the "**Motions**"). In addition to her own Motion, DeCaires has also joined in the C&C Motion and Totto Motion. See DeCaires Motion at 3; see also DeCaires Joinder to Totto Motion at 2 (Nov. 9, 2016) (*Exhibit "4"*). Defendant Totto likewise joined in the C&C Motion. See Totto Substantive Joinder to C&C Motion (Sept. 21, 2016) ("**Totto Joinder**") (*Exhibit "5"*).

Plaintiffs' Memoranda in Opposition to the DeCaires Motion ("**MIO to DeCaires Motion**" (*Exhibit "6"*)), C&C Motion ("**MIO to C&C Motion**" (*Exhibit "7"*)), and Totto Motion ("**MIO to Totto Motion**" (*Exhibit "8"*)) (collectively the "**MIOs**") fail to rebut Defendants' arguments that the allegations in the Complaint do not satisfy the requirements of Rule 8 of the Hawaii Rules of Civil Procedure ("**HRCP**"). Plaintiffs also fail to explain why the Court should not strike the immaterial, impertinent, and scandalous allegations in the Complaint.

Instead, Plaintiffs have engaged in further character assignation of DeCaires and her co-defendants. Plaintiffs' inflammatory rhetoric is uncalled for and does not meet any known legal standard for opposing the Motions. Therefore, for the reasons set forth in the Motions and below, DeCaires respectfully requests that the Court grant the Motions in their entirety.

I. DECAIRES IS ENTITLED TO A MORE DEFINITE STATEMENT OF THE ALLEGATIONS AGAINST HER IN THE COMPLAINT

Plaintiffs argue that the allegations in their Complaint are sufficiently pled because Hawaii only requires "notice pleading," and the Court must construe complaints "liberally and not technically." MIO to DeCaires Motion (*Exhibit "6"*) at 5 (quoting Island Holidays v.

Fitzgerald, 58 Haw. 552, 567, 574 P.2d 884 (1978)) (internal quotation marks omitted); see also MIO to C&C Motion (*Exhibit "7"*) at 4.

Though Hawaii is a notice pleading jurisdiction, Plaintiffs overlook HRCP Rule 8(a)(1), which states that a pleading **shall** contain "a **short and plain** statement of the claim . . . ." Haw. R. Civ. P. 8(a)(1) (emphasis added). They also fail to acknowledge that under HRCP Rule 8(e)(1), each averment of a pleading must be "simple, concise, and direct." Haw. R. Civ. P. 8(e)(1).

To comply with HRCP Rule 8, Plaintiffs must "set forth a short and plain statement of the claim that provides defendant **with fair notice of what the plaintiff's claim is and the grounds upon which the claim rests**." Tokuhisa v. Cutter Mgmt. Co., 122 Hawaii 181, 192, 223 P.3d 246, 257 (App. 2009) (emphasis added) (quoting Genesys Data Technologies, Inc. v. Genesys Pac. Technologies, Inc., 95 Hawaii 33, 41, 18 P.3d 895, 903 (2001)).

As described below, the allegations in the Complaint are anything but "short and plain," and Plaintiffs have failed to identify the grounds upon which their claims rest.

A. Plaintiffs Fail to Identify the Alleged False and Defamatory Statements Made By DeCaires

In order to state a claim for defamation against DeCaires, Plaintiffs must, at a minimum, establish that she made a "false and defamatory statement concerning another." Gold v. Harrison, 88 Hawaii 94, 100, 962 P.2d 353, 359 (1998). Without knowing what the alleged false and defamatory statements are, DeCaires cannot frame a response via pleading or motion. See, e.g., Ekberg v. Pennington, No. CIV.A.02-845, 2002 WL 1611641, at *1 (E.D. La. July 19, 2002) ("A district court will grant a motion for a more definite statement pursuant to Rule 12(e) when the pleading at issue 'is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading.'" (quoting Fed. R. Civ. P. 12(e)).

Plaintiffs allege that DeCaires made a number of false and defamatory statements. Complaint ¶¶ 38, 50(e), 80, 84(a), 99(a), 99(c), 99(d), 99(e), 101(a), 126. Yet, they only identify one actual statement that she made as being allegedly false and defamatory, which she disputes. See Complaint ¶ 84(b); MIO to DeCaires Motion (*Exhibit "6"*) at 3. **None** of the other paragraphs from the Complaint quoted in Plaintiffs' MIO identify the actual alleged false and/or defamatory statements DeCaires purportedly made.

For example, Plaintiffs cite paragraphs 80, 84(a), 84(b), 84(c), 99(a), 99(b), 99(c), and 99(d) as evidence of DeCaires' alleged defamatory statements. MIO to DeCaires Motion (*Exhibit "6"*) at 3-4. Yet, none of those paragraphs or the exhibits cited in support thereof clarifies what the false and/or defamatory statements were. See, e.g., id. at 2 (quoting paragraph 80 of Complaint, which cites Exhibit 41; Exhibit 41 is a Request for Information from the State of Hawaii Organization of Police Officers ("**SHOPO**") related to a class grievance filed by SHOPO).

Likewise, in their MIO to the C&C Motion, Plaintiffs argue that "DeCaires falsely accused the [P]laintiffs of having an undisclosed business relationship with an HPD officer with respect to a solar water hearing [sic] company." MIO to C&C Motion (*Exhibit "7"*) at 2. DeCaires believes this statement pertains to Plaintiffs' allegations in paragraphs 115-118 of the Complaint. Those paragraphs, however, do not identify the specific false accusations by DeCaires. Complaint ¶¶ 115-118.

Plaintiffs also argue that DeCaires "falsely informed the state taxing authorities that the plaintiffs had improperly claimed solar tax credits based upon the fabricated claim that three [sic] was an improper business relationship noted above." MIO to C&C Motion (*Exhibit "7"*) at 2-3. DeCaires believes Plaintiffs are referring to their allegations in paragraph 101(a) of the Complaint. Neither that paragraph nor the exhibits referenced in support of allegations identify (1) what the alleged false statement was and/or (2) who made the false statement. See Complaint ¶ 101(a) and Exhibits 32 and 67 attached thereto.

In addition, Plaintiffs argue that the Complaint "details how false information fed by Totto/DeCaires, and given extra weight because [sic] provided under the auspices of the Honolulu Ethics Commission, launched a federal probe of the [P]laintiffs . . . ." MIO to C&C Motion (*Exhibit "7"*) at 3. Yet, other than identifying a single exhibit in the approximately 1,000 pages of exhibits, Plaintiffs have failed to identify specific false and defamatory statements made by DeCaires.

Plaintiffs have failed to identify the paragraphs in the Complaint and/or exhibits showing what defamatory statements were made by DeCaires. Arguing that the "evidence of false accusations . . . are based upon hearsay evidence, and so cannot be precisely stated at present," and that the evidence of the alleged "false and defamatory accusations will be found in the investigatory files of the Ethics Commission," MIO to C&C Motion (*Exhibit "7"*) at 6, does not remedy the defects in the Complaint. Without knowing what **any** of the allegedly false and/or defamatory statements are, DeCaires cannot reasonably be required to frame a responsive pleading or motion.

B. **Plaintiffs Failed to Clarify the Conclusory Allegations In Their Complaint**

DeCaires argued that Plaintiffs' Complaint contains a number of conclusory allegations that do not have any factual support. Memorandum in Support ("**MIS**") to DeCaires Motion (*Exhibit "1"*) at 3-4 (citing Complaint ¶¶ 119-132). Plaintiffs' task in rebutting this argument was simple: identify the allegations in the Complaint that support the conclusory statements in paragraphs 119-132. Plaintiffs have failed to do so and instead respond by further attacking DeCaires' character with generalized allegations of wrongdoing. See MIO to DeCaires Motion (*Exhibit "6"*) at 4. Plaintiffs' MIO is nonresponsive and is further reason why the Court should grant the Motions.

C. **Plaintiffs Have Not Identified the Alleged "Standards of Conduct" that Were Violated**

The term "Standards of Conduct" is mentioned in paragraphs 8, 11, 13, 17, 50, 50(a), 75, 99, 101(d), 112, and the prayer for relief in the Complaint. Plaintiffs do not, however, state what "Standards of Conduct" they are referring to. See MIS to C&C Motion (*Exhibit "2"*) at 12-13. Plaintiffs' general allegation of violations of the "Standards of Conduct" is simply insufficient to comply with HRCP Rule 8's requirement that a claim for relief contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Haw. R. Civ. P. 8(a)(1); see also Barker v. Gottlieb, 978 F. Supp. 2d 1168, 1174 (D. Haw. 2013) (holding that plaintiff's allegation that defendants violated U.S. Interstate Commerce laws, without identifying "the specific laws Defendants allegedly violated," nor "how Plaintiff was harmed by the alleged violations" was insufficient to satisfy FRCP Rule 8's requirement to state a short and plain statement of the claim).

In their MIO, Plaintiffs fail to identify what alleged "Standards of Conduct" have been violated. Rather, they engage in an *ad hominem* attack on the C&C Defendants' counsel. See MIO to C&C Motion (*Exhibit "7"*) at 7 ("The fact that the Honolulu Ethics Commission, through its legal counsel, can somehow claim that they do not know what the term 'Standards of Conduct' means is simply the plainest evidence of the insincerity of the instant motion.").

Accordingly, the Court should order Plaintiffs to provide a more definite statement regarding the "Standards of Conduct" allegedly violated.

D. Plaintiffs Have Not Adequately Addressed the Defects With Their Claims for Declaratory and Injunctive Relief

In response to the C&C Defendants' argument that Plaintiffs have not provided any factual allegations in the Complaint as to declaratory and injunctive relief, Plaintiffs argue that they are "prepared to submit a comprehensive legal memorandum which explains just how the Ethics Commission has been violating its own procedures and statutory requirements." MIO to C&C Motion (*Exhibit "7"*) at 5-6. Although the claim for declaratory relief appears to be only directed at the Ethics Commission, see Complaint at 43 ¶ D, the claim for injunctive relief is directed at the "defendants." Id. at 43 ¶ E.

Plaintiffs' offering to submit a legal memoranda to clarify allegations in their Complaint, rather than pointing out what paragraphs in the Complaint support their claims, is further evidence of the need for the Court to order Plaintiffs to amend their Complaint to clearly state their allegations and claims in accordance with HRCP Rule 8.

II. THE COURT SHOULD STRIKE THE EXHIBITS AND IDENTIFIED PARAGRAPHS FROM THE COMPLAINT

A. The Exhibits Should be Stricken

The Court should grant Defendants' request to strike the voluminous, and largely irrelevant, exhibits attached to the Complaint. See MIS to C&C Motion (*Exhibit "2"*) at 15-18; MIS to DeCaires Motion (*Exhibit "1"*) at 4-5; MIS to Totto Joinder (*Exhibit "5"*) at 6. Plaintiffs have failed to provide any meaningful or substantive response to the Motions. See MIO to DeCaires Motion (*Exhibit "6"*) at 4 (stating, without reference, that the exhibits attached to the Complaint contain information regarding Plaintiffs' claim of defamation); MIO to C&C Motion (*Exhibit "7"*) at 8 (stating without addressing Defendants' arguments that the Court "is urged to reject defendants' apparent gamesmanship").

DeCaires should not "be required to sift through voluminous and haphazard exhibits attached to a complaint simply to determine what, exactly, [she] is defending [herself] against; the complaint itself should be sufficient." Dockens v. Dekalb Cty. Sch. Sys., No. 1:07-CV-1345-CAP, 2008 WL 9396388, at *4 (N.D. Ga. Apr. 25, 2008). As demonstrated above regarding

Plaintiffs' claim for defamation, with the exception of one exhibit, Plaintiffs do not identify where DeCaires' alleged defamatory statements are in the exhibits.

Under HRCP Rule 8, neither Defendants nor the Court should have to pour over the exhibits to try to find out what specific allegations Plaintiffs are making. See, e.g., Laster v. Pramstaller, No. 08-CV-10898, 2008 WL 1901250, at *2 (E.D. Mich. Apr. 25, 2008) ("[N]either the Court nor Defendants are obligated to search through the Complaint and its voluminous exhibits in order to glean a clear and succinct statement of each claim for relief. It is Plaintiffs' responsibility to edit and organize their claims and supporting allegations into a manageable format." (quoting Windsor v. Colo. Dept' of Corr., 9 Fed. Appx. 967, 968 (10th Cir. 2001)); Hinske v. Cuyahoga Cty., No. 1:13 CV 2844, 2014 WL 2173748, at *3 (N.D. Ohio May 23, 2014) ("Neither the Court nor the Defendant are obligated to search through the Complaint and its voluminous exhibits in order to glean a clear and succinct statement of each claim for relief." (citing Laster, 2008 WL 1901250, at *2)); Kramer v. Allmon, No. 15-CV-05451-HSG, 2016 WL 4427045, at *2 (N.D. Cal. Aug. 22, 2016) ("Plaintiff is cautioned that exhibits are not a substitute for meeting the pleading requirements of Rule 8. The Court is not required to—and will not—sift through exhibits trying to piece together Plaintiff's possible claims.").

Based on the authorities above and Plaintiffs' failure to rebut Defendants' arguments, the Court should strike the voluminous and haphazard exhibits attached to the Complaint.

B. **Immaterial, Impertinent, and Scandalous Paragraphs Should Be Stricken**

DeCaires argued that paragraphs 20-36 and 55-63 should be stricken from the Complaint because they pertain to third-parties, do not appear to be germane to Plaintiffs' claims, and are therefore immaterial, impertinent, and scandalous. MIS to DeCaires Motion (*Exhibit "1"*) at 5. The C&C Defendants also argued that the information in those paragraphs was, among other things, confidential. MIS to C&C Motion (*Exhibit "2"*) at 13-14. Plaintiffs address Defendants DeCaires and C&C Defendant's arguments by focusing on the confidential nature of the information, and argue without support (other than general references to the Complaint) that Defendants Totto and DeCaires already leaked "Information" to the public. MIO to C&C Motion (*Exhibit "7"*) at 7. Plaintiffs do not state what specific "Information" they are referring to and/or how the allegations in paragraphs 20-36 and 55-63 of the Complaint had the "effect of damaging the plaintiffs."

Because Plaintiffs failed to address and/or explain the relevance of the identified paragraphs above to this action, the Court should strike paragraphs 20-36 and 55-63 from the Complaint. See Illinois Nat. Ins. Co. v. Nordic PCL Const., Inc., 870 F. Supp. 2d 1015, 1040 (D. Haw. 2012) ("[C]ourts will generally grant a motion to strike only when the moving party has proved that the matter to be stricken could have no possible bearing on the subject matter of the litigation.").

The Court should also strike paragraphs 6-19, 37-38, 42-50(c), 67-70, and 99(j)-(l) from the Complaint (or alternatively the bolded text in paragraphs 6, 9, 17, 42-44, 47-48, and 52 identified on pages 5-6 of the Totto Motion), because they are immaterial and/or impertinent. See DeCaires Joinder to Toto Motion (*Exhibit "4"*) at 2; MIS to Toto Motion (*Exhibit "3"*) at 3-4. DeCaires cannot discern from Plaintiffs' MIO to Totto Motion or her own how the specifically identified paragraphs above have any bearing on Plaintiffs' claims against DeCaires in this case. See Illinois Nat. Ins. Co., 870 F. Supp. 2d at 1040. Plaintiffs appear to argue that the inflammatory accusations are to "justify the award of substantial punitive damages which plaintiff [sic] will be seeking against [Totto]." MIO to Totto Motion (*Exhibit "8"*) at 3. They do not, however, argue that those paragraphs are necessary to support their damages claim against DeCaires. Accordingly, the Court should, at a minimum, grant the Totto Motion to the extent the allegations in the paragraphs identified above pertain to DeCaires.

III. CONCLUSION

For the foregoing reasons and those set forth in the Motions, DeCaires respectfully requests that the Court grant the Motions in their entirety.

DATED: Honolulu, Hawaii, November 15, 2016.

DAVID M. LOUIE
NICHOLAS R. MONLUX

Attorneys for Defendant
LETHA A.S. DECAIRES,
individually and as investigator
for the Honolulu Ethics Commission

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA, Plaintiffs, vs. CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission; LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission; HONOLULU ETHICS COMMISSION; and THE CITY AND COUNTY OF HONOLULU, Defendants.	CIVIL NO. 16-1-1166-6 GWBC (Non-Motor Vehicle Tort) DECLARATION OF COUNSEL

DECLARATION OF COUNSEL

I, NICHOLAS R. MONLUX, declare and aver as follows:

1. I am an attorney with Kobayashi Sugita & Goda, LLP, and one of the attorneys representing Defendant LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission ("**DeCaires**") in the above-captioned matter.

2. I am competent to testify to the facts set forth herein, and unless otherwise indicated, make this declaration based upon my personal knowledge.

3. I make this declaration in support of DeCaires' Reply to Plaintiffs' Memorandum in Opposition to DeCaires' Motion (A) for More Definite Statement, (B) to Strike, and (C) to Join Defendants HONOLULU ETHICS COMMISSION and CITY AND COUNTY OF HONOLULU (collectively "**C&C Defendants**")' Motion for More Definite Statement and Motion to Strike ("**Reply**").

4. Exhibits "1"-"8," identified below, are attached to the Reply for the Court's convenience.

5. Attached to the Reply as Exhibit "1" is a true and correct copy of DeCaires' Motion (A) for More Definite Statement, (B) to Strike, and (C) to Join C&C Defendants' Motion for More Definite Statement and Motion to Strike, filed September 20, 2016 (without the attached exhibits). A true and correct copy of Exhibit "1" is kept and maintained in my firm's files in the regular and ordinary course of its business.

6. Attached to the Reply as Exhibit "2" is a true and correct copy of the C&C Defendants' Motion for More Definite Statement and Motion to Strike. A true and correct copy of Exhibit "2" is kept and maintained in my firm's files in the regular and ordinary course of its business.

7. Attached to the Reply as Exhibit "3" is a true and correct copy of Defendant CHARLES W. TOTTO ("**Totto**")'s Motion to Strike Verified Complaint and/or Portions Thereof, filed September 21, 2016 (without the attached exhibit). A true and correct copy of Exhibit "3" is kept and maintained in my firm's files in the regular and ordinary course of its business.

8. Attached to the Reply as Exhibit "4" is a true and correct copy of DeCaires' Joinder to Totto's Motion to Strike Verified Complaint and/or Portions Thereof, filed November 9, 2016. A true and correct copy of Exhibit "4" is kept and maintained in my firm's files in the regular and ordinary course of its business.

9. Attached to the Reply as Exhibit "5" is a true and correct copy of Totto's Substantive Joinder to C&C Defendants' Motion for More Definite Statement and Motion to Strike, filed September 21, 2016. A true and correct copy of Exhibit "5" is kept and maintained in my firm's files in the regular and ordinary course of its business.

10. Attached to the Reply as Exhibit "6" is a true and correct copy of Plaintiffs LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA ("**Plaintiffs**)' unfiled Memorandum in Opposition to DeCaires Motion (a) For More Definite Statement, (B) to Strike, and (C) to Join C&C Defendants' Motion For More Definite Statement and Motion to Strike, dated November 10, 2016. A true and correct copy of Exhibit "6" is kept and maintained in my firm's files in the regular and ordinary course of its business.

11. Plaintiffs' counsel emailed a copy of Exhibit "6" to me on November 10, 2016. As of the filing of this Reply, I have not received a file-marked copy of Exhibit "6."

12. Attached to the Reply as Exhibit "7" is a true and correct copy of Plaintiffs' Memorandum in Opposition to the C&C Motion for More Definite Statement and Motion to Strike, filed July 26, 2016. A true and correct copy of Exhibit "7" is kept and maintained in my firm's files in the regular and ordinary course of its business.

13. Attached to the Reply as Exhibit "8" is a true and correct copy of Plaintiffs' unfiled Memorandum in Opposition to Totto's Motion to Strike Verified Complaint and/or Portions Thereof, dated November 10, 2016. A true and correct copy of Exhibit "8" is kept and maintained in my firm's files in the regular and ordinary course of its business.

14. Plaintiffs' counsel emailed a copy of Exhibit "8" to me on November 10, 2016. As of the filing of this Reply, I have not received a file-marked copy of Exhibit "8."

I, NICHOLAS R. MONLUX, declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawaii, November 15, 2016.

NICHOLAS R. MONLUX

EXHIBIT "1"

EXHIBIT "1"

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STATE OF HAWAII
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individually and as investigator
for the Honolulu Ethics Commission

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA, Plaintiffs, vs. CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission; LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission; HONOLULU ETHICS COMMISSION; and THE CITY AND COUNTY OF HONOLULU, Defendants.	CIVIL NO. 16-1-1166-6 GWBC (Non-Motor Vehicle Tort) DEFENDANT LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission's **MOTION (A) FOR MORE DEFINITE STATEMENT, (B) TO STRIKE, AND (C) TO JOIN DEFENDANTS HONOLULU ETHICS COMMISSION AND CITY AND COUNTY OF HONOLULU'S MOTION FOR MORE DEFINITE STATEMENT AND MOTION TO STRIKE**; MEMORANDUM IN SUPPORT OF MOTION; DECLARATION OF COUNSEL; EXHIBITS "A" – "B"; NOTICE OF HEARING; CERTIFICATE OF SERVICE Hearing Date: NOV 09 2016 Time: 3:00 PM Judge: Gary W.B. Chang Trial Date: None

DEFENDANT LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission's MOTION (A) FOR MORE DEFINITE STATEMENT, (B) TO STRIKE, AND (C) TO JOIN DEFENDANTS HONOLULU ETHICS COMMISSION AND CITY AND COUNTY OF HONOLULU'S MOTION FOR MORE DEFINITE STATEMENT AND MOTION TO STRIKE

Defendant LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission ("**DeCaires**"), by and through her attorneys, Kobayashi Sugita & Goda, LLP, hereby moves (a) for a more definite statement, (b) to strike the Verified Complaint for Damages, Declaratory and Injunctive Relief filed on June 17, 2016 ("**Complaint**"), and (c) to join Defendants Honolulu Ethics Commission and City and County of Honolulu's Motion for More Definite Statement and Motion to Strike ("**City and County's Motion**").

Pursuant to Rule 12(e) of the Hawaii Rules of Civil Procedure ("**HRCP**"), DeCaires seeks a more definite statement because the Complaint does not clearly identify claims against DeCaires, and is so vague and ambiguous as to preclude DeCaires from formulating any reasonable response. By failing to provide such information, the Complaint does not comply with HRCP Rule 8(a)'s requirement that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." DeCaires therefore requests an order directing Plaintiffs LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA (collectively "**Plaintiffs**") to provide a more definitive statement identifying the specific claims against each named Defendant, including allegations regarding the elements of those claims, and such further information as required by the Court.

Pursuant to HRCP Rule 12(f), DeCaires also moves to strike Plaintiffs' redundant, immaterial, impertinent, and scandalous matters from the Complaint, and to strike the approximately thousand pages of exhibits attached thereto.

Finally, pursuant to Rule 7.2 of the Rules of the Circuit Courts of the State of Hawaii, and HRCP Rules 6(d) and 7, DeCaires moves to join the City and County's Motion, and respectfully requests that the hearing on this Motion be consolidated with the City and County's Motion, which is set for October 4, 2016 at 3:00 p.m. Because DeCaires joins in and incorporates by reference the arguments in the Memorandum in Support of the City and County's Motion, it would be in the interest of judicial efficiency and economy to hear the motions at the same time.

This Motion is supported by the accompanying Memorandum in Support of Motion, Declaration and Exhibits attached hereto, such further evidence and argument that may be presented to the Court, and the entire record and files of this case.

DATED: Honolulu, Hawaii, September 20, 2016.

DAVID M. LOUIE
NICHOLAS R. MONLUX

Attorneys for Defendant
LETHA A.S. DECAIRES,
individually and as investigator
for the Honolulu Ethics Commission

1480075-5

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA, Plaintiffs, vs. CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission; LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission; HONOLULU ETHICS COMMISSION; and THE CITY AND COUNTY OF HONOLULU, Defendants.	)	CIVIL NO. 16-1-1166-6 GWBC (Non-Motor Vehicle Tort) MEMORANDUM IN SUPPORT OF MOTION

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Rule 8(a)(1) of the Hawaii Rules of Civil Procedure ("**HRCP**") requires a "short and plain statement of the claim showing that the pleader is entitled to relief." The purpose of a complaint under Rule 8 is to give the defendants fair notice of the factual basis of the claims and of the basis for the court's jurisdiction. See Tokuhisa v. Cutter Mgmt. Co., 122 Hawaii 181, 192, 223 P.3d 246, 257 (App. 2009); In re Genesys Data Techs., Inc. v. Genesys Pac. Techs., Inc., 95 Hawaii 33, 41, 18 P.3d 895, 903 (2001) ("Hawaii's rules of notice pleading require that a complaint set forth a short and plain statement of the claim that provides defendant with fair notice of what the plaintiff's claim is and the grounds upon which the claim rests.").

Although Rule 8 is not violated per se by length, verbosity, or ambiguity, a number of cases are "quick to point out that excessive page length, verbosity, or ambiguity can rise to the extent necessary to deny the defendant fair notice of the grounds upon which the claim rests." In re Mortgages Ltd., No. 2:08-BK-07465-RJH, 2013 WL 1336830, at *12 (Bankr. D. Ariz. Mar. 29, 2013) (collecting cases); see also Canalez v. Bob's Appliance Serv. Ctr., Inc., 89 Hawaii 292, 306, 972 P.2d 295, 309 (1999) ("Where a Hawai'i rule of civil procedure is identical to the federal rule, 'the interpretation of this rule by federal courts is highly persuasive.'" (quoting Shaw v. N. Am. Title Co., 76 Hawaii 323, 326, 879 P.2d 1291, 1294 (1994)); compare Haw. R. Civ. P. 8(a)(1) (a pleading "shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief"), with Fed. R. Civ. P. 8(a)(2) (a pleading "must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief"). "Something labeled a complaint but written more as a press release, prolix in evidentiary detail, yet without simplicity, conciseness and clarity as to whom plaintiffs are suing for what wrongs, **fails to perform the essential functions of a complaint.**" McHenry v. Renne, 84 F.3d 1172, 1177-80 (9th Cir. 1996) (emphasis added).

In this case, Plaintiffs LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA (collectively "**Plaintiffs**")' Complaint for Damages, Declaratory and Injunctive Relief, filed on June 17, 2016 ("**Complaint**"), attached hereto (without exhibits) as Exhibit "A," fails to "perform the essential functions of a complaint."

The 44-page Complaint, which contains 132 numbered paragraphs and approximately a thousand pages of exhibits is meandering, repetitive, vague and ambiguous, and does not clearly identify the claims against Defendant LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission, ("**DeCaires**") showing that any pleader is entitled to relief. See Schmidt v. Herrmann, 614 F.2d 1221, 1223-24 (9th Cir. 1980) (not "short and plain" when plaintiff's complaint was 30 pages without distinguishing cause of action, and was "confusing, distracting, ambiguous, and unintelligible" in presentation). For example, Plaintiffs allege that "false statements made by defendants were defamatory and defamatory per se." Complaint ¶ 128. Yet, almost all of the allegations in the Complaint regarding "false" and/or "defamatory" statements made by DeCaires are conclusory, at best, and do not identify the alleged "false" and/or "defamatory" statement(s) made. See Complaint ¶¶ 38, 50(e), 80, 84(a), 99(a), 99(c), 99(d), 99(e), 101(a), 101(e), 126.

The first element of a claim for defamation is a "false **and** defamatory statement concerning another . . . ." Gold v. Harrison, 88 Hawaii 94, 100, 962 P.2d 353, 359 (1998) (emphasis added) (quoting Dunlea v. Dappen, 83 Hawaii 28, 36, 924 P.2d 196, 204 (1996)). Without knowing what the alleged false and defamatory statements are, DeCaires cannot adequately defend herself against these claims. See, e.g., Mahoe v. Operating Eng'rs Local Union No. 3 of the Int'l Union of Operating Eng'rs, AFL-CIO, No. CIV. 13-00186 HG-BMK, 2013 WL 5447261, at *8 (D. Haw. Sept. 27, 2013) (dismissing defamation claim under Hawaii law, in part, because "[t]he Complaint lacks information about the actual content of any allegedly defamatory statements. There is no identification of an author of any such statements. There is no information about when any defamatory statements were made").

In addition, Plaintiffs make a series of conclusory allegations against "Defendants" in paragraphs 119-132.[1] Because Plaintiffs do not, identify any specific alleged conduct giving rise to these claims, DeCaires cannot formulate an adequate response via an answer or motion to

[1] Following paragraph 129 are incorrectly numbered paragraphs 108, 109, and 110. DeCaires refers to these paragraphs as paragraphs 130, 131, and 132, respectively.

dismiss. Rather, she is forced to speculate as to which allegations form the basis for Plaintiffs' conclusory claims against her. Such forced speculation violates HRCP Rule 8. See Vierra-Pupunu v. OneWest Bank, No. CV. 10-00313 DAE KSC, 2011 WL 1304858, at *11 (D. Haw. Apr. 4, 2011) ("Although FRCP Rule 8 requires only that a complaint include a 'short and plain statement of the claim showing that the pleader is entitled to relief,' the complaint must sufficiently put Defendants on fair notice of the claim asserted and the ground upon which it rests. **Defendants, nor the Court, are required to speculate as to which provisions Plaintiff is suing under or how Defendants violated such provisions**." (emphasis added)); see also Garcia v. IndyMac Bank, F.S.B., No. 2:12-CV-02997-ODW, 2012 WL 1745782, at *1 (C.D. Cal. May 16, 2012) ("Plaintiff must plead a short and plain statement of the elements of her claim, 'identifying the transaction or occurrence giving rise to the claim and the elements of a prima facie case.'" (quoting Bautista v. Los Angeles County, 216 F.3d 837, 840 (9th Cir. 2000)).

Accordingly, the Court should grant this Motion and order Plaintiffs to provide a more definite statement identifying the specific claims against each named Defendant, including allegations regarding the elements of those claims, and such further information the Court requires. See McHenry, 84 F.3d at 1179-80 ("[T]he judge may in his discretion, in response to a motion for a more definite statement under Federal Rule of Civil Procedure 12(e), require such detail as may be appropriate in the particular case, and may dismiss the complaint if his order is violated. Prolix, confusing complaints such as the ones plaintiffs filed in this case impose unfair burdens on litigants and judges.").

DeCaires also requests an order striking Plaintiffs' redundant, immaterial, impertinent, and scandalous matters from the Complaint, and the approximately thousand pages of exhibits attached thereto. Plaintiffs have improperly appended evidentiary materials to their Complaint that are unnecessary, lengthy, and prejudicial to Defendants in this case. See 5C Charles Alan Wright, et al., Federal Practice and Procedure § 1383 (3d ed.) Westlaw (database updated Apr. 2016) ("[S]ince pleading evidence is not favored . . . because it violates the principle of simplicity of statement, evidentiary allegations may be stricken, particularly if the excessive narrative is lengthy, or if the details are inadmissible or prejudicial.").

The allegations in the Complaint regarding third parties are immaterial, impertinent, and scandalous because the third-parties mentioned are not named defendants. Further, the allegations involving the third-parties do not appear to be germane to any claim in the Complaint (to the extent a claim can be deciphered). See Complaint ¶¶ 20-36 and 55-63. These paragraphs should be stricken so as to avoid creating "unnecessary notoriety" and to "protect the person who is the subject of the allegations." Wright, et al., supra, § 138.

Further, Defendants should not have to sift through thousands of pages of exhibits to determine what, exactly, they are defending themselves against. Dockens v. Dekalb Cty. Sch. Sys., No. 1:07-CV-1345-CAP, 2008 WL 9396388, at *4 (N.D. Ga. Apr. 25, 2008) ("No defendant should be required to sift through voluminous and haphazard exhibits attached to a complaint simply to determine what, exactly, it is defending itself against; **the complaint itself should be sufficient**." (emphasis added)); U.S. ex rel. Garst v. Lockheed-Martin Corp., 328 F.3d 374, 378 (7th Cir. 2003) ("Rule 8(a) requires parties to make their pleadings straightforward, so that judges and adverse parties need not try to fish a gold coin from a bucket of mud. . . . [J]udges have better things to do, and the substantial subsidy of litigation (court costs do not begin to cover the expense of the judiciary) should be targeted on those litigants who take the preliminary steps to assemble a comprehensible claim."). Therefore, it is also appropriate for the Court to strike exhibits attached to the Complaint.

II. ARGUMENT

Although DeCaires' is seeking the same relief set forth in Defendant Honolulu Ethics Commission and City and County of Honolulu's Motion for More Definite Statement (**"City Defendants' Motion"**), the undersigned believes it was necessary to bring a separate motion to fulfill DeCaires' obligation under the HRCP to respond to the Complaint. Nevertheless, to avoid drafting a completely duplicative motion that would waste the Court's time, DeCaires hereby adopts, joins in, and incorporates by reference the arguments on pages 3-18 of the Memorandum in Support of the City Defendants' Motion, which is attached hereto as Exhibit "B."

III. CONCLUSION

For the reasons set forth above and in the Memorandum in Support of the City Defendants' Motion, DeCaires respectfully requests that the Court grant this Motion.

DATED: Honolulu, Hawaii, September 20, 2016.

DAVID M. LOUIE
NICHOLAS R. MONLUX

Attorneys for Defendant
LETHA A.S. DECAIRES,
individually and as investigator
for the Honolulu Ethics Commission

Document ID: 1480518-2

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA, Plaintiffs, vs. CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission; LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission; HONOLULU ETHICS COMMISSION; and THE CITY AND COUNTY OF HONOLULU, Defendants.	CIVIL NO. 16-1-1166-6 GWBC (Non-Motor Vehicle Tort) DECLARATION OF COUNSEL

DECLARATION OF COUNSEL

I, NICHOLAS R. MONLUX, declare the following to be true and correct based upon my personal knowledge:

1. I am an attorney at the law firm of Kobayashi Sugita & Goda, LLP, counsel to LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission ("**DeCaires**") in the above-entitled matter.

2. I make this declaration pursuant to Rule 7(g) of the Rules of the Circuit Court, State of Hawaii, and in support of DeCaires' Motion (A) For More Definite Statement, (B) To Strike, and (C) To Join DEFENDANTS HONOLULU ETHICS COMMISSION AND CITY

AND COUNTY OF HONOLULU's Motion for More Definite Statement and Motion to Strike, filed on July 11, 2016 (**"DeCaires' Motion"**).

3. Attached to DeCaires' Motion as Exhibit "A" is a true and correct copy of Plaintiffs LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA (**"Plaintiffs"**)s' Complaint for Damages, Declaratory and Injunctive Relief, filed on June 17, 2016 (**"Complaint"**). Due to size of the exhibits attached to Plaintiffs' Complaint—approximately 1,000 pages—the Complaint attached to DeCaires' Motion does not include exhibits. A copy of the Complaint is kept and maintained in my firm's files in the ordinary course of its business.

4. Attached to DeCaires' Motion as Exhibit "B" is a true and correct copy of Defendant Honolulu Ethics Commission and City and County of Honolulu's Motion for More Definite Statement and Motion to Strike, filed on July 11, 2016 (**"City & County's Motion"**). A copy of the City & County's Motion is kept and maintained in my firm's files in the ordinary course of its business.

I, NICHOLAS R. MONLUX, declare upon penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawai'i, September 19, 2016

NICHOLAS R. MONLUX

EXHIBIT "2"

EXHIBIT "2"

1ST CIRCUIT COURT
STATE OF HAWAII
FILED

2016 JUL 11 PM 1:09

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA,

Plaintiffs,

vs.

CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission; LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission; HONOLULU ETHICS COMMISSION; and THE CITY AND COUNTY OF HONOLULU,

Defendants.

CIVIL NO. 16-1-1166-6 GWBC
(Non-Motor Vehicle Tort)

DEFENDANTS HONOLULU ETHICS COMMISSION AND CITY AND COUNTY OF HONOLULU'S MOTION FOR MORE DEFINITE STATEMENT AND MOTION TO STRIKE; MEMORANDUM IN SUPPORT OF MOTIONS; NOTICE OF HEARING; CERTIFICATE OF SERVICE

Hearing
Date: August 3, 2016
Time: 3:00 p.m.
Judge: Honorable Gary W. B. Chang

Trial Date: None.

DEFENDANTS HONOLULU ETHICS COMMISSION
AND CITY AND COUNTY OF HONOLULU'S
MOTION FOR MORE DEFINITE STATEMENT AND MOTION TO STRIKE

Defendants Honolulu Ethics Commission and City and County of Honolulu ("City Defendants") move for a more definite statement and to strike regarding the Verified Complaint for Damages, Declaratory and Injunctive Relief ("Complaint"), filed on June 17, 2016.

Pursuant to Rule 12(e) of the Hawai'i Rules of Civil Procedure (HRCP), City Defendants seek a more definite statement because the Complaint, despite its inflammatory language, length, and prolixity, does not clearly identify any claims against the City Defendants (nor against any other Defendant), and is so vague and ambiguous as to preclude City Defendants from formulating any reasonable response. By failing to provide such information, the Complaint does not comply with the mandate in HRCP Rule 8(a) that a complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief."

The City Defendants are therefore entitled to an order directing Plaintiffs to provide a more definite statement identifying the specific claims against each named Defendant, including allegations regarding the elements of those claims, and such further information as required by the Court.

Pursuant to HRCP Rule 12(e), City Defendants also seek to strike Plaintiffs' redundant, immaterial, impertinent, and scandalous matters from the Complaint and the nearly thousand pages of exhibits attached thereto.

This motion is supported by the enclosed memorandum of law, the record herein, and such additional matters the Court may entertain, including oral argument, at the time of the hearing on this motion.

DATED: Honolulu, Hawai'i, July 11, 2016.

DONNA Y. L. LEONG
Corporation Counsel

By ______________________
PAUL S. AOKI
ROBERT M. KOHN
Deputies Corporation Counsel

Attorneys for Defendants
HONOLULU ETHICS
COMMISSION and CITY AND
COUNTY OF HONOLULU

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA, Plaintiffs, vs. CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission; LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission; HONOLULU ETHICS COMMISSION; and THE CITY AND COUNTY OF HONOLULU, Defendants.	CIVIL NO. 16-1-1166-6 GWBC (Non-Motor Vehicle Tort) MEMORANDUM IN SUPPORT OF MOTIONS

MEMORANDUM IN SUPPORT OF MOTIONS

INTRODUCTION

The City Defendants[1] move for a more definite statement of the claims against them because the Complaint,[2] despite its inflammatory language ("terrorize," "whitewash," "favoritism,", "patronage, "abusive"), length, and

[1] Defendants Honolulu Ethics Commission and City and County of Honolulu.

[2] Verified Complaint for Damages, Declaratory and Injunctive Relief, filed on June 17, 2016.

prolixity, does not clearly identify any claims against the City Defendants (nor against any other Defendant), and is so vague and ambiguous as to preclude City Defendants from formulating any reasonable response.

For example, while the Complaint is entitled "Verified Complaint for Damages, Declaratory and Injunctive Relief," it fails to articulate what declaratory and injunctive relief the Plaintiffs seek.

By failing to provide such information, the Complaint does not comply with the mandate in Rule 8(a) of the Hawai'i Rules of Civil Procedure (HRCP) that a complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." City Defendants are therefore entitled to an order directing Plaintiffs to provide a more definite statement identifying the specific claims against each named Defendant, including allegations regarding the elements of those claims, and such further information as required by the Court.

City Defendants also seek to strike Plaintiffs' redundant, immaterial, impertinent, and scandalous matters from the Complaint and the nearly thousand pages of exhibits attached thereto. Plaintiffs have improperly appended evidentiary materials to their Complaint, which are prejudicial both to Defendants and to individuals not named as parties in this lawsuit.

THE COMPLAINT

The Complaint contains 131 numbered paragraphs[3] and is 44 pages long, including a "Verification" by Plaintiff Katherine Kealoha stating that the contents of the Complaint and attached exhibits are "true and correct" but not stating that she has personal knowledge of any matter.

The Complaint lists 76 exhibits, though some of those exhibits are missing. The exhibits are nearly a thousand pages long (Bates nos. KCOM 1–991).[4]

The Complaint contains no list of counts, no clearly identified claims against the City Defendants, and in fact no clearly stated claim against any Defendant showing that any pleader is entitled to relief.

LEGAL STANDARDS

A. HRCP Rule 8(a) – General rules of pleading.

HRCP Rule 8(a)(1) requires a pleading to contain "a short and plain statement of the claim showing that the pleader is entitled to relief," which "provides defendant with fair notice of what the plaintiff's claim is and the grounds

[3] The Complaint misnumbers the three paragraphs after paragraph 129 as 108, 109, and 110.

[4] The copy of the exhibits provided to City Defendants contained no numbered tabs nor a Bates-numbered list of exhibits indicating where each one begins, making it difficult to locate the more than 70 documents cited at the end of the numerous paragraphs in the Complaint.

upon which the claim rests."[5]

B. HRCP Rule 12(e) – Motion for more definite statement.

HRCP Rule 12(e) permits a party to move for a more definite statement of a pleading that is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." It is within the court's discretion whether to grant the motion, and the court may dismiss the complaint if the order is violated.[6]

Although Rule 12(e) motions are generally disfavored, they are appropriate when a pleading does not satisfy the requirement of Rule 8(a) that a pleading contain allegations as to each element of a claim.[7]

In addition, in "cases involving public officials who may be entitled to qualified immunity, the court is more likely to grant a Rule 12(e) motion."[8]

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[5] *Childs v. Harada*, 130 Hawai'i 387, 404 (App. 2013), quoting *In re Genesys Data Technologies, Inc.*, 95 Hawai'i 33, 41 (2001).

[6] *McHenry v. Renne*, 84 F.3d 1172, 1179 (9th Cir. 1996) ("[T]he judge may in his discretion, in response to a motion for more definite statement under Federal Rule of Civil Procedure 12(e), require such detail as may be appropriate in the particular case, and may dismiss the complaint if his order is violated.") When a Hawai'i rule of civil procedure is patterned after an equivalent federal rule, interpretations by the federal courts are considered highly persuasive. *Gap v. Puna Geothermal Venture*, 106 Hawai'i 325, 341 (2004) (citation omitted).

[7] *Gorthy v. Clovis Unified Sch. Dist.*, No. CVF05-1052RECJLO, 2006 WL 236939, at *6 (E.D. Cal. Jan. 31, 2006), quoting 2 Moore's FEDERAL PRACTICE, § 12.36[1] (3d ed.).

[8] *Sneller v. City of Bainbridge Island*, No. C07-5338RBL, 2007 WL 4562882, at *2 (W.D. Wash. Dec. 21, 2007).

"Qualified immunity is the right to be immune from suit."[9] This issue of whether a party is entitled to qualified immunity must be resolved early in the case to preserve this right.[10] It is incumbent upon a court to exercise its discretion so that officials who may be entitled to qualified immunity are not subjected to unnecessary and burdensome discovery.[11]

C. HRCP Rule 12(f) – Motion to strike.

HRCP Rule 12(f) provides that "[t]he court may order stricken from any pleading … any redundant, immaterial, impertinent, or scandalous matter." "A motion to strike must be made before responding to the challenged pleading."[12] A court has considerable discretion in ruling on a motion to strike.[13]

The rule is also "designed to reinforce the requirement in Rule 8(e) that pleadings be simple, concise, and direct."[14] A court may consider the fact that "[i]t would take significant judicial resources for the court to sift through the

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[9] *Id.*, citing *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985).

[10] *Id.*, citing *Mitchell.*

[11] *Id.*, citing *Crawford-El v. Britton,* 523 U.S. 574, 597–98 (1998); *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982) (discovery should not be allowed until the threshold immunity question is resolved).

[12] Wright, Miller, Kane & Spencer, 10B FEDERAL PRACTICE AND PROCEDURE § 1380.

[13] *Id.*, § 1382 ("The district court possesses considerable discretion in disposing of a Rule 12(f) motion to strike redundant, impertinent, immaterial, or scandalous matter.").

[14] *Id.*, § 1380.

[complaint] (and its voluminous exhibits) to determine which allegations are relevant to the claims.[15]

While motions to strike are generally disfavored, if they serve to remove unnecessary clutter from a case, they actually expedite the litigation rather than delay it.[16] "[S]ince pleading evidence is not favored under the ... rules because it violates the principle of simplicity of statement, evidentiary allegations may be stricken, particularly if the excessive narrative is lengthy, or if the details are inadmissible or prejudicial."[17]

Exhibits that are redundant, immaterial, and only serve to inflame the passions may be stricken because they are immaterial at the pleading stage.[18] A court even has "discretion to *dismiss* a claim due to a party's excessive attachment of unnecessary exhibits."[19]

D. HRS Chapter 632 – Declaratory Judgments.

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[15] See *Beavers-Gabriel v. Medtronic, Inc.*, No. CIV. 13-00686 JMS, 2014 WL 4723802, at *2 (D. Haw. Sept. 22, 2014).

[16] *Miller v. City of Harvey*, No. 13 C 9257, 2014 WL 3509760, at *5 (N.D. Ill. July 15, 2014), citing *Heller Fin., Inc. v. Midwhey Powder Co.,* 883 F.2d 1286, 1294 (7th Cir. 1989).

[17] *Id.*, 2014 WL 3509760, at *5.

[18] *Id.*

[19] *WebQuest.com, Inc. v. Hayward Industries, Inc.*, 2010 WL 4630230, *2 (E.D. Cal. 2010) (italics added), citing *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 415 (9th Cir.1985) (noting that district court did not abuse discretion in dismissing complaint that included over 70 pages of exhibits).

The declaratory judgment statute grants a court the power, "[i]n cases of actual controversy," to make "binding adjudications of right" only if the court is "satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding." HRS § 632-1.

E. HRCP Rule 65 – Injunctions.

The form and scope of injunctions is set out in HRCP Rule 65(d), which provides:

> [e]very order granting an injunction … shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail … the act or acts sought to be restrained …. (HRCP 65(d)).

ARGUMENT

I. The City Defendants Are Entitled to a More Definite Statement of the Complaint Because It Is Vague, Ambiguous, Prolix, Confusing, and Fails to Clearly Identify Any Claims Against the City Defendants.

Plaintiffs' Complaint, despite its length and incendiary language, fails to clearly identify any claims against the City Defendants (or any other Defendant), rendering it impossible to prepare a response. While pleading standards are generally liberal, there can be enormous burdens and unfairness when a complaint grossly violates basic principles of pleading.

Praising a succinct federal form pleading for negligence, the Ninth Circuit (whose interpretations are considered "highly persuasive"[20]), noted that it "fully

[20] *Gap*, 106 Hawai'i at 341.

sets forth who is being sued, for what relief, and on what theory, with enough detail to guide discovery. It can be read in seconds and answered in minutes."[21] The court contrasted that with the complaint it was reviewing, stating that it was "argumentative, prolix, replete with redundancy, and largely irrelevant."[22]

The Ninth Circuit noted that "[p]rolix, confusing complaints … impose unfair burdens on litigants and judges,"[23] and elaborated on these burdens:

> As a practical matter, the judge and opposing counsel, in order to perform their responsibilities, cannot use a complaint such as the one plaintiffs filed, and must prepare outlines to determine who is being sued for what. Defendants are then put at risk that their outline differs from the judge's, that plaintiffs will surprise them with something new at trial which they reasonably did not understand to be in the case at all, and that res judicata effects of settlement or judgment will be different from what they reasonably expected. "[T]he rights of the defendants to be free from costly and harassing litigation must be considered."[24]

Such is the case here. The City Defendants intend to file a motion to dismiss the Complaint but cannot discern the universe of the claims against them. Without a more definite statement, there is a considerable risk that Plaintiffs will oppose the motion to dismiss by arguing that certain vague allegations constitute claims that are not clearly identified as claims in the motion to dismiss. The City Defendants and the Court should not have to perform such detective work. Some of the particular deficiencies are discussed in detail below.

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[21] *McHenry*, 84 F.3d at 1177.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 1179–80 (citation omitted).

A. Declaratory Relief

The Complaint is captioned one for "Damages, Declaratory and Injunctive Relief."

The declaratory judgment statute grants a court the power to make "binding adjudications of right" only if there is an "actual controversy" and the court is "satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding." HRS § 632-1.

Plaintiffs make no allegations in support of their claim for declaratory relief, even though the "rules of good pleading are as important in a suit for a declaratory judgment as in any other civil action."[25]

Apart from the caption, the only mention of declaratory relief is in paragraph D of the prayer for relief, which contains this vague, overbroad, and totally inappropriate prayer for declaratory relief:

> D. For Declaratory relief, determining that the process and procedures of the Ethics Commission in instigating investigations and prosecuting violations of the Standards of Conduct are in violation of the law, and to determine the proper procedures as described in the applicable statutes and rules[.] (Complaint, p. 43.)

The "violation" mentioned in paragraph D of the prayer does not allege that an "actual controversy" exists and only references "the process and procedures of the Ethics Commission," which is so vague and overbroad that neither the Defendants nor the Court can possibly know as to which "process and procedures" Plaintiffs are seeking a declaration. Furthermore, "Standards of Conduct" is a vague phrase used 15 times in the Complaint, without citing the specific standard at issue.

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[25] C. Wright, A. Miller & M. Kane, 10B FEDERAL PRACTICE AND PROCEDURE § 2768 (3d ed.).

"Before a court may grant declaratory relief based on a … violation, the violation must be set forth with specificity; broad, vague and ill-defined allegations … are insufficient."[26]

Finally, asking this Court to issue a declaratory judgment "to determine the proper procedures as described in the applicable statutes and rules" far exceeds the Court's statutory authority to make "binding adjudications of right." In effect, the Plaintiffs are inviting the Court to override the authority of the Ethics Commission to determine its own procedures, and to become embroiled in an ongoing supervisory role of this City department.

B. Injunctive Relief

There are also no allegations in the Complaint as to injunctive relief, which is again only addressed in the title of the Complaint and the prayer for relief:

E. For injunctive relief, requiring the Ethics Commission and

[26] *Heimbaugh v. City & County of San Francisco*, 923 F.2d 862, at *4 (9th Cir. 1991).

> defendants to comply with the law and the required procedures for instituting investigations and prosecuting violations of the Standards of Conduct[.] (Complaint, p. 43.)

This language is no less vague than the prayer for declaratory relief, and thus the allegation fails to satisfy the standards of specificity imposed by the law of injunctions,[27] expressly requiring that

> [e]very order granting an injunction … shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail … the act or acts sought to be restrained …. (HRCP 65(d)).

C. Defamation

The Complaint repeats the word "defamatory" six times.[28] Is this a claim for defamation? One can only guess, as there is no count entitled "defamation" or "libel" or "slander." Plaintiffs' allegations fail to satisfy even the generous notice pleading requirements under Rule 8(a). They have failed to identify the alleged defamatory statements and the time and circumstances when those statements were made. Plaintiffs should be ordered to provide this information in the Complaint, as other courts have ordered with similarly deficient pleadings of defamation.[29]

"A complaint is insufficient when it does not allege either the specific words or the substance of statements alleged to be defamatory."[30] The reason is that "[t]he defining feature of a defamation claim is a statement of fact that is provably false," and because "rhetorical hyperbole, vigorous epithet[s], lusty and imaginative expression[s] of...contempt, and language used in a loose, figurative sense have all been accorded constitutional protection."[31] A California court has noted:

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[27] See *Cognitest Corp. v. Riverside Pub. Co.*, No. 94 C 4741, 1994 WL 727980, at *4 (N.D. Ill. Dec. 30, 1994), aff'd, 107 F.3d 493 (7th Cir. 1997).

[28] Complaint, ¶¶ 80, 84(a), 99(a), 99(c), 128 (2).

[29] See, e.g., *Hall v. Whitacre*, No. 06-1240, 2007 WL 1585960 at *3 (D. Kan. May 31, 2007) (granting a motion for a more definite statement to identify the substance

> It is sometimes said to be a requirement, and it certainly is the common practice, to plead the exact words or the picture or other defamatory matter. The chief reason appears to be that the court must determine, as a question of law, whether the defamatory matter is on its face or capable of the defamatory meaning attributed to it by the innuendo. Hence, the complaint should set the matter out verbatim, either in the body or as an attached exhibit.[32]

In short, if Plaintiffs are indeed asserting a claim for defamation, they should be ordered to provide a more definite statement of the claim consistent with the above authorities.

D. Violations of "Standards of Conduct"

The Complaint alleges knowing violations of the "Standards of Conduct." (¶

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of the alleged slanders and when the statements occurred); *PAI Corp. v. Integrated Sci. Solutions, Inc.*, No. C-06-5349, 2007 WL 1229329 at *9 (N.D. Cal. Apr. 25, 2007) (ordering a more definite statement when defendants have failed to identify "when they were made and to whom they were made.").

[30] *Morse v. County of Merced*, No. 116CV00142DADSKO, 2016 WL 3254034, at *9 (E.D. Cal. June 13, 2016) (internal quotation marks and citation omitted).

[31] *Id.* (internal quotation marks and citations omitted).

[32] *Id.* (citation omitted).

50). It is unclear whether this is a claim and the "standards of conduct" to which they refer. If so, Plaintiffs should provide a more definite statement of it.

Plaintiffs also allege in paragraph 108 that Plaintiff Katherine Kealoha and others have filed eight complaints with the Ethics Commission regarding some or all of the alleged violations contained in other paragraphs of the Complaint. Plaintiffs should be ordered to clarify whether they are asking the Court to assert concurrent jurisdiction over those complaints before the Ethics Commission and whether those complaints are currently before or have been decided by the Ethics Commission, or whether the Complaint is making a different claim regarding the "standards of conduct."

II. The Court Should Strike the Redundant, Immaterial, Impertinent, and Scandalous Matters From the Complaint and the Nearly Thousand Pages of Exhibits.

A court has considerable discretion to strike "redundant, immaterial, impertinent, or scandalous matter."[33]

A. Certain allegations in the Complaint should be stricken.

According to its rules of procedure,[34] the records of the Ethics Commission are kept confidential (with certain limited exceptions).[35] By filing this Complaint and placing Ethics Commission matters relating to third parties in the public record, they violate the confidentiality of those persons who are not parties to this lawsuit.

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[33] HRCP Rule 12(e); Wright, Miller, Kane & Spencer, *supra*, § 1382.

[34] The City Defendants request that the Court take judicial notice of the Ethics Commission's Rules of Procedure. "Courts may take judicial notice of the rules and regulations of an administrative agency…." 60 AM. JUR. PROOF OF FACTS 3d 175 (2001). The Court may take judicial notice of facts that are both "generally known" within this Court's jurisdiction and "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be

Allegations regarding third parties[36] are immaterial, impertinent, and scandalous because they are not named defendants. They should therefore be stricken so they do not create "unnecessary notoriety" by becoming public documents and hence "generally available."[37] Courts may strike pleadings "to purge the court's files and protect the person who is the subject of the allegations."[38] Courts have eliminated allegations that adversely reflect on persons who are not parties.[39] Moreover, these allegations are not germane to any claim,

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questioned." HRE Rule 201(b).

[35] Ethics Commission Rules of Procedure, Rule 1.11(a), available at: http://www.honolulu.gov/rep/site/ethics/rules/Rules_of_Procedure.pdf; see also Frequently Asked Questions available at http://www.honolulu.gov/ethics/faqs.html.

[36] Paragraphs 20–27, 28–36, and 55–63 of the Complaint contain allegations against third parties. Moreover, Exhibit 13, for example, contains the personal LinkedIn Profile of a nonparty. [LinkedIn is a social networking service. See https://en.wikipedia.org/wiki/LinkedIn].

[37] Wright, Miller, Kane & Spencer, *supra*, § 1382.

[38] *Id.*

[39] *Id.*, § 1383.

another reason to strike them.[40]

The Complaint violates the mandate of HRCP Rule 8(e) that allegations be "simple, concise, and direct." Instead, it recites evidentiary material at great length. "[S]ince pleading evidence is not favored under the … rules because it violates the principle of simplicity of statement, evidentiary allegations may be stricken, particularly if the excessive narrative is lengthy, or if the details are inadmissible or prejudicial."[41]

B. The exhibits should be stricken.

The Complaint does not clearly identify any claims against the City Defendants or any other Defendant showing that any Plaintiff is entitled to relief. On the other hand, nearly a thousand pages of exhibits (including more than 50 newspaper articles) are attached, with exhibit numbers inserted at the end of allegations without any specification as to what portions of the exhibits are being referenced and for what purpose. By incorporating this undifferentiated mass of materials, Plaintiffs may assume they have stated claims, but the rules and case law are contrary.

HRCP "Rule 10(c) authorizes the incorporation of 'any written instrument which is an exhibit' attached to a pleading and makes the material thus incorporated an integral part of that pleading for all purposes.[42] For example, in a complaint alleging breach of contract, it would be appropriate to attach the contract as an exhibit.[43] On the other hand, "exhibits containing largely evidentiary material typically do not qualify as 'written instruments' under Rule 10(c)."[44] Otherwise stated, "lengthy or numerous exhibits containing extraneous or evidentiary material should not be attached to the pleadings."[45] Motions to strike that remove unnecessary clutter serve to expedite the litigation, not delay it.[46]

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[40] See *id.*

[41] *Miller*, 2014 WL 3509760, at *5.

Exhibits are no substitute for a properly pled complaint. If a party "were allowed to make allegations essential to its claims in documents merely attached to its complaint," then the opposing party "might have difficulty understanding the nature of the … claim."[47] A court may consider the fact that it would require significant judicial resources to sift through voluminous exhibits.[48] A plaintiff "may not rely on the Court to wade through the exhibits and piece together his claims. It is Plaintiff's duty to clearly support his claims with sufficient allegations."[49]

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[42] Wright, Miller, Kane & Spencer, *supra*, § 1327.

[43] See *Signature Flight Support Corp. v. Am. Trans Air, Inc.*, No. 8:07 CV 2219 T24 TGW, 2010 WL 883643, at *2 (M.D. Fla. Mar. 5, 2010).

[44] *Thaut v. Hsieh*, No. 215CV0590JAMKJNPS, 2016 WL 3058235, at *10 (E.D. Cal. May 31, 2016), citing *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

[45] *Montgomery v. Buege*, No. CIV. 08-385 WBS KJM, 2009 WL 1034518, at *3 (E.D. Cal. Apr. 16, 2009), quoting Wright, Miller, Kane & Spencer, *supra*, § 1327.

[46] *Miller v. City of Harvey*, No. 13 C 9257, 2014 WL 3509760, at *5 (N.D. Ill. July 15, 2014) (internal quotation marks omitted), citing *Heller Fin., Inc. v. Midwhey Powder Co.,* 883 F.2d 1286, 1294 (7th Cir. 1989).

[47] Wright, Miller, Kane & Spencer, *supra*, § 1327 n.23, quoting *United States v. Citigroup Smith Barney Account No. 600-00338 Held in the Name of Alexander*, No. 06-CV-3730(NGG), 2008 WL 2474642, at *1 (E.D.N.Y. June 19, 2008).

Courts grant motions to strike exhibits when they do not qualify as "written instruments" under Rule 10(c)."[50] A court may strike exhibits "in the nature of evidence submitted to bolster allegations contained in the complaint."[51]

Plaintiffs have appended more than 50 newspaper articles as exhibits.[52] These are not, however, "the type of documentary evidence or 'written instruments' which Rule 10(c) intended to be incorporated into ... the complaint").[53]

Exhibits that only serve to inflame the passions may also be stricken because they are immaterial at the pleading stage.[54] A court even has "discretion to *dismiss* a claim due to a party's excessive attachment of unnecessary exhibits."[55]

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[48] See *Beavers-Gabriel, Inc.*, 2014 WL 4723802, at *2 (D. Haw. Sept. 22, 2014).

[49] *Hernandez v. Smith*, No. 109CV00828OWWGSAPC, 2009 WL 4546722, at *2 (E.D. Cal. Dec. 2, 2009).

[50] *Thaut*, 2016 WL 3058235, at *10 (citations omitted).

[51] *Id.*, quoting *Montgomery v. Buege*, 2009 WL 1034518, at *3 (E.D. Cal. Apr. 16, 2009).

[52] Complaint, Exhibits 4, 12, 18, 19 (multiple), 20, 22 (multiple), 26 (multiple), 34 (multiple), 35, 36 (multiple), 38, 53 (multiple), 54 (multiple), 55 (multiple), 56, 66.

[53] *Thaut*, 2016 WL 3058235, at *10 quoting *Perkins v. Silverstein*, 939 F.2d 463, 467 n.2 (7th Cir. 1991).

[54] *Id.*

Finally, Plaintiffs' attempt to magnify the weight of their exhibits with a "Verification" based on "information and belief" is unavailing. The effect of a verification is to accord it the weight of an affidavit, but statements in an affidavit have no value unless they are based on personal knowledge or some other admissible ground."[56] Such is not the case with Plaintiffs' Verification and exhibits.

CONCLUSION

The Court should grant the City Defendants' motion for a more definite statement and direct Plaintiffs to file a First Amended Complaint that clearly identifies the specific claims against each named Defendant, including allegations regarding the elements of those claims, and such further information as required by the Court.

The Court should also grant the City Defendants' motion to strike allegations from the Complaint, as well as the exhibits.

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[55] *WebQuest.com, Inc. v. Hayward Industries, Inc.*, 2010 WL 4630230, *2 (E.D. Cal. 2010) (italics added), citing *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 415 (9th Cir.1985) (noting that district court did not abuse discretion in dismissing complaint that included over 70 pages of exhibits). Here more than ten times that number are attached to the Complaint.

[56] *Parker v. Learn Skills Corp.*, 530 F. Supp. 2d 661, 670 (D. Del. 2008).

DATED: Honolulu, Hawai'i, July 11, 2016.

DONNA Y. L. LEONG
Corporation Counsel

By ______________________
PAUL S. AOKI
ROBERT M. KOHN
Deputies Corporation Counsel

Attorneys for Defendants
HONOLULU ETHICS
COMMISSION and CITY AND
COUNTY OF HONOLULU

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA, Plaintiffs, vs. CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission; LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission; HONOLULU ETHICS COMMISSION; and THE CITY AND COUNTY OF HONOLULU, Defendants.	CIVIL NO. 16-1-1166-6 GWBC (Non-Motor Vehicle Tort) NOTICE OF HEARING

NOTICE OF HEARING

TO: KEVIN P.H. SUMIDA, ESQ.
ANTHONY K. WONG, ESQ.
LANCE S. AU, ESQ.
STEPHEN K. ROY, ESQ.
Sumida Au & Wong
735 Bishop Street, Suite 411
Honolulu, Hawaiʻi 96813

Attorneys for Plaintiffs

Notice is hereby given that the foregoing Motion shall come on for Hearing before the Honorable Gary W.B. Chang, Judge of the above-entitled Court, in his courtroom at Circuit Court of the First Circuit, Ka'ahumanu Hale, 777 Punchbowl Street, Honolulu, Hawai'i 96813, on August 3, 2016 at 3:00 p.m. or soon thereafter as counsel may be heard.

DATED: Honolulu, Hawai'i, July 11, 2016.

DONNA Y. L. LEONG
Corporation Counsel

By [signature]
PAUL S. AOKI
ROBERT M. KOHN
Deputies Corporation Counsel

Attorneys for Defendants
HONOLULU ETHICS
COMMISSION and CITY AND
COUNTY OF HONOLULU

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA, Plaintiffs, vs. CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission; LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission; HONOLULU ETHICS COMMISSION; and THE CITY AND COUNTY OF HONOLULU, Defendants.	CIVIL NO. 16-1-1166-6 GWBC (Non-Motor Vehicle Tort) CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that, on July 11, 2016 and by the methods of service noted below, a true and correct copy of the foregoing was served on the following at their last known address as shown below:

KEVIN P.H. SUMIDA, ESQ. ANTHONY K. WONG, ESQ. LANCE S. AU, ESQ. STEPHEN K. ROY, ESQ. 735 Bishop Street, Suite 411 Honolulu, Hawaiʻi 96813 *Attorneys for Plaintiffs*	*Via U.S. Mail, Postage Prepaid*

CHARLES W. TOTTO
3846 Mariposa Drive
Honolulu, Hawai'i 96816
Defendant

Via U.S. Mail, Postage Prepaid

LETHA A.S. DECAIRES
1022 Loho Street
Kailua, Hawai'i 96734
Defendant

Via U.S. Mail, Postage Prepaid

DATED: Honolulu, Hawai'i, July 11, 2016.

DONNA Y. L. LEONG
Corporation Counsel

By ______________________
PAUL S. AOKI
ROBERT M. KOHN
Deputies Corporation Counsel

Attorneys for Defendants
HONOLULU ETHICS
COMMISSION and CITY AND
COUNTY OF HONOLULU

EXHIBIT "3"

EXHIBIT "3"

FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

2016 SEP 21 PM 3:55

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA, Plaintiffs, vs. CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission; LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission; HONOLULU ETHICS COMMISSION; and THE CITY AND COUNTY OF HONOLULU, Defendants.	CIVIL NO. 16-1-1166-6 GWBC (Non-Motor Vehicle Tort) DEFENDANT CHARLES W. TOTTO'S MOTION TO STRIKE VERIFIED COMPLAINT AND/OR PORTIONS THEREOF; MEMORANDUM IN SUPORT OF MOTION; DECLARATION OF JOACHIM P. COX; EXHIBIT 1; NOTICE OF HEARING ON MOTION AND CERTIFICATE OF SERVICE DATE: NOV 18 2016 TIME: 3:00 p.m JUDGE: Hon. Gary W.B. Chang No Trial Date Set

DEFENDANT CHARLES W. TOTTO'S MOTION TO STRIKE VERIFIED COMPLAINT AND/OR PORTIONS THEREOF

Defendant Charles W. Totto ("Mr. Totto"), by and through his attorneys, Cox Fricke LLP, hereby move this Honorable Court for an order striking all immaterial,

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA, Plaintiffs, vs. CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission; LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission; HONOLULU ETHICS COMMISSION; and THE CITY AND COUNTY OF HONOLULU, Defendants.	CIVIL NO. 16-1-1166-6 GWBC (Non-Motor Vehicle Tort) NOTICE OF HEARING ON MOTION AND CERTIFICATE OF SERVICE DATE: ________ TIME: ________ JUDGE: Hon. Gary W.B. Chang No Trial Date Set

NOTICE OF HEARING ON MOTION

TO: All Parties Listed on the attached Certificate of Service

NOTICE IS HEREBY GIVEN that the foregoing Motion shall come on for hearing before the Honorable Gary W.B. Chang, Judge of the above-entitled Court, in his courtroom at the Circuit Court of the First Circuit, Kaʻahumanu Hale, 777 Punchbowl Street, Honolulu, Hawaiʻi 96813, on NOV 18 2016 at 3:00 o'clock p.m., or as soon thereafter as counsel may be heard.

DATED: Honolulu, Hawaiʻi, September 21, 2016.

JOACHIM P. COX
ROBERT K. FRICKE
KAMALA S. HAAKE
Attorneys for Defendant
CHARLES W. TOTTO

COX FRICKE LLP
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA, Plaintiffs, vs. CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission; LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission; HONOLULU ETHICS COMMISSION; and THE CITY AND COUNTY OF HONOLULU, Defendants.	CIVIL NO. 16-1-1166-6 GWBC (Non-Motor Vehicle Tort) DEFENDANT CHARLES W. TOTTO'S MOTION TO STRIKE VERIFIED COMPLAINT AND/OR PORTIONS THEREOF; MEMORANDUM IN SUPORT OF MOTION; DECLARATION OF JOACHIM P. COX; EXHIBIT 1; NOTICE OF HEARING ON MOTION AND CERTIFICATE OF SERVICE DATE: __________ TIME: __________ JUDGE: Hon. Gary W.B. Chang No Trial Date Set

DEFENDANT CHARLES W. TOTTO'S MOTION TO STRIKE VERIFIED COMPLAINT AND/OR PORTIONS THEREOF

Defendant Charles W. Totto ("Mr. Totto"), by and through his attorneys, Cox Fricke LLP, hereby move this Honorable Court for an order striking all immaterial, impertinent and/or scandalous allegations in Plaintiffs' Verified Complaint for Damages, Declaratory and Injunctive Relief filed on June 17, 2016.

This Motion is brought pursuant to Hawai'i Rules of Civil Procedure Rules 7 and 12(f) and Hawai'i Rules of the Circuit Court Rule 7 and is based upon the attached memorandum in support of motion, declaration and exhibits, the records and file herein, and such other and further matters as may be properly brought to the attention of the Court at the hearing on this Motion.

DATED: Honolulu, Hawai'i, September 21, 2016.

JOACHIM P. COX
ROBERT K. FRICKE
KAMALA S. HAAKE

Attorneys for Defendant
CHARLES W. TOTTO

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA, Plaintiffs, vs. CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission; LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission; HONOLULU ETHICS COMMISSION; and THE CITY AND COUNTY OF HONOLULU, Defendants.	CIVIL NO. 16-1-1166-6 GWBC (Non-Motor Vehicle Tort) MEMORANDUM IN SUPORT OF MOTION

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

The Honolulu Ethics Commission and The City and County of Honolulu's Motion to Strike properly argued that allegations regarding third parties, as well as the 1,000 plus pages of exhibits attached to the Verified Complaint, should be stricken. In addition, the Court should strike all immaterial, impertinent, scandalous, and/or inflammatory allegations. Although the Verified Complaint is so prolix that it does not provide any notice of Plaintiffs' claims against Mr. Totto, even construing the Verified Complaint liberally, numerous allegations have nothing to do with any claims that

Plaintiffs may have against Mr. Totto or the other Defendants. Rather, they are inserted for color and to paint Mr. Totto in a negative light. As such, in addition to being irrelevant, immaterial, and/or scandalous, these types of allegations have the very possibility of prejudicing Mr. Totto. Therefore, should the Court decline to grant the Honolulu Ethics Commission and The City and County of Honolulu's Motion for a More Definite Statement, Defendant Charles W. Totto respectfully requests that the Court grant his Motion to Strike.

II. ARGUMENT

A. All Immaterial or Impertinent Allegations Should Be Stricken

It is within the Court's discretion to strike "immaterial, impertinent or scandalous" allegations that "have no possible bearing on the subject matter of the litigation." *Parks v. Watkins*, Civ. No. 11-00304 SOM/KSC, 2011 U.S. Dist. LEXIS 86934, at *4-5 (D. Haw. Aug. 5, 2012); *see also* Haw. R. Civ. Proc. 12(f). Matters are immaterial if they have no essential or important relationship to the claims or defenses pled. *Parks*, 2011 U.S. Dist. LEXIS 86934, at *5; *see also Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993) ("Superfluous historical allegations are a proper subject of a motion to strike."), *rev'd on other grounds*, 510 U.S. 517, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994). Similarly, impertinent matters are those that do not pertain, and are not necessary, to the issues in question. *Id.*

The Verified Complaint alleges general actions that Mr. Totto took during his tenure at the Ethics Commission that have nothing to do with Plaintiffs but, presumably, are inserted to present Mr. Totto in an unflattering manner. However, these types of allegations have no bearing on whatever claims Plaintiffs may be alleging against Mr. Totto and the resulting damages that Mr. Totto allegedly caused Plaintiffs personally. As such, they should be stricken. *See, e.g., Williams v. Averitt Express*, 8:1CV464, 2016 U.S. Dist. LEXIS 16977, at *6 (E.D. Neb. Feb. 11, 2016) (striking "general comments" that, while "may bear on the same topic as the current litigation[,]" do not "fairly present a question of fact for consideration for these parties"); *Wagner v. Hotzapple*, 101 F. Supp. 3d 462, 489 (M.D. Penn. 2015) (striking introduction section that is "argumentative, impertinent and wholly irrelevant").

In particular, the following sections in the Verified Complaint should be stricken as immaterial and impertinent:

- "Overview—Corruption of Unchecked Power" (Compl. ¶¶ 6-19): This section contains sweeping allegations regarding the effect that Mr. Totto and Ms. DeCaires's investigations in Plaintiffs, as well as Mr. Totto's alleged "misapplication of the laws and procedures of the Ethics Commission" have had on ***others***, namely the taxpayers, the Honolulu Prosecutor's Office, the Honolulu Police Department, and other City employees.

- "Whitewash of Questionable Conduct at the Board of Water Supply, and Witness Intimidation" (Compl. ¶¶ 20-27): These allegations revolve solely around a the Board of Water Supply's award of a contract to the company owned by a former Board of Water Supply executive. This section does not even mention Plaintiffs and has nothing to do with Plaintiffs.

- "Whitewash of 'Illegal' Action of the Mayor" (Compl. ¶¶ 28-36): This section alleges that Mr. Totto, due to his personal friendship with the then-Mayor, issued a favorable opinion regarding the Mayor's retention of funds from a foreign donor that had been specifically earmarked to cover the Mayor's wife's travel expenses to the donor's country. Again, this section does not mention Plaintiffs, nor does it have anything to do with Plaintiffs.

- "Improper Favoritism, Patronage, and Use of City Resources" (Compl. ¶¶ 35-36): These paragraphs allege that Mr. Totto used his position to: (1) hire a family friend at the Ethics Commission and (2) recommend a family friend for a position with the Hawai'i State government. Like the preceding paragraphs in the Verified Complaint, these allegations have no bearing on any potential claims by Plaintiffs.

- "Circumvention of hiring and procurement laws" (Compl. ¶¶ 37-38): These paragraphs describe the process by which Ms. DeCaires was hired and her contract renewed. Notably, Plaintiffs acknowledge that the use of multiple contract renewals is "technically within the bounds of the law." As such, Plaintiffs admit that these allegations do not state a cognizable claim.

- "Abdication of Authority by the Ethics Commission" (Compl. ¶¶ 42-50(c)): This section alleges that: (1) Mr. Totto had a "Wall of Shame" or "Trophy Board" depicting ethics offenders that Mr. Totto used for ethics training and (2) Mr. Totto exempted himself from and violated the Standards of Conduct. There are no allegations that Plaintiffs were injured by Mr. Totto's alleged actions.

- "Totto and DeCaires Focus Upon Plaintiffs" (Compl. ¶¶ 67-70): This section focuses on an unrelated dispute that Plaintiffs had with Board of Water Supply regarding Plaintiffs' bill. The only nexus to Mr. Totto is the conclusory allegation that "[v]arious [Board of Water Supply] executives . . . suggested that plaintiff[s] would regret taking any action," subsequent to which Plaintiffs then "became the subjects of multiple investigations by Totto and DeCaires."

- "Wide Ranging Abusive and Ever Expanding Investigations" (Compl. ¶ 99(j), (k), (l)): These two subsections respectively allege that: (1) Mr. Totto and Ms. DeCaires deliberately harassed and bullied HPD and Prosecutor's Office employees, (2) Mr. Totto and/or Ms. DeCaires harassed and bullied Police Commission members, and (3) Mr. Totto and/or Ms. DeCaires improperly shared information received in the course of their investigations with other government agencies. These allegations do not appear to contend that Plaintiffs suffered any harm as a result of Mr. Totto's actions.

As noted above, because none of these sections or paragraphs allege that Plaintiffs were directly harmed by Mr. Totto's alleged actions, they cannot form the basis of any claims against Mr. Totto and should be stricken.

B. Scandalous and Inflammatory Allegations Should Be Stricken

The Court may also strike scandalous allegations that "bear[] no possible relation to the controversy or may cause the objecting party prejudice." *Talbot v. Robert Matthews Distribution Co.*, 961 F.2d 654, 664-65 (7th Cir. 1992). The Verified Complaint, in vilifying Mr. Totto, resorts to unnecessarily inflammatory and scandalous language that, in light of the highly publicized nature of these proceedings, may prejudice Mr. Totto's ability to obtain a fair and impartial jury. As such, the following bolded phrases should be stricken:

- "Totto and DeCaires have, since 2013 conducted a series of **unfounded, vindictive, unsubstantiated and illegal** investigations of plaintiffs, at great cost to the taxpayors [sic] and to the enrichment of at least DeCaires. Their actions caused, not only significant financial loss to the taxpayers, but an immeasurable effect on the morale of City employees and community members who have witnessed such **grotesque abuses of power and process.**" Compl. ¶ 6.

- "**With callous disregard for the lives and reputations of others, and the demoralizing effect [Mr. Totto's and Ms. DeCaires's] vicious conduct** has had on a number of County agencies and employees, both Totto and DeCaires have to date committed **serious ethical, moral** and professional violations **with impunity**." Compl. ¶ 9.

- "Besotted by unchecked power, Totto abused his position to help himself and his friends and allies, punish his enemies and those who would not comply with his demands, exempt himself from the standards of conduct applicable to all other city employees, and

terrorize city employees by way of disparate and inconsistent application of the Standards of Conduct." Compl. ¶ 17.

- "Totto was less interested in educating city employees as to their ethical requirements, than in creating a **reign of terror**." Compl. ¶ 44.

- References to Mr. Totto's alleged "**Trophy Board**." Compl. ¶¶ 42-44, 47, 48, 52.

See, *e.g.*, *Wailua Assocs. v. Aetna Cas. & Sur. Co.*, 183 F.R.D. 550, 556 (D. Haw. 1998) (finding the term "siege warfare" scandalous).

III. CONCLUSION

For all the foregoing reasons, Defendant Charles W. Totto respectfully requests that the Court strike any and all immaterial, impertinent, and/or scandalous allegations from the Verified Complaint.

DATED: Honolulu, Hawai'i, September 21, 2016.

JOACHIM P. COX
ROBERT K. FRICKE
KAMALA S. HAAKE

Attorneys for Defendant
CHARLES W. TOTTO

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA, Plaintiffs, vs. CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission; LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission; HONOLULU ETHICS COMMISSION; and THE CITY AND COUNTY OF HONOLULU, Defendants.	CIVIL NO. 16-1-1166-6 GWBC (Non-Motor Vehicle Tort) DECLARATION OF JOACHIM P. COX

DECLARATION OF JOACHIM P. COX

I, JOACHIM P. COX , declare and say that:

1. I am an attorney licensed to practice before all of the courts of the State of Hawaiʻi, a partner with the firm Cox Fricke LLP, and counsel of record for Defendant Charles W. Totto ("Mr. Totto"). All of the information stated herein is information based on my personal knowledge that I learned in my capacity as counsel for Mr. Totto. If called as a witness I could and would testify to the truth of the matters stated herein except as to those matters stated to be true on information and belief, and as to those matters I believe them to be true.

2. Attached hereto as Exhibit "1" is a true and correct copy of the Verified Complaint for Damages, Declaratory and Injunctive Relief filed June 17, 2016 without the attached exhibits.

I declare under penalty of perjury under the laws of the State of Hawai'i and the United States that the foregoing is true and correct.

Executed this 21st day of September, 2016, at Honolulu, Hawai'i.

JOACHIM P. COX

EXHIBIT "4"

EXHIBIT "4"

1491061-2

1ST CIRCUIT COURT
STATE OF HAWAII
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L. YONESAKI
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Attorneys for Defendant
LETHA A.S. DECAIRES,
individually and as investigator
for the Honolulu Ethics Commission

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA,	CIVIL NO. 16-1-1166-6 GWBC (Non-Motor Vehicle Tort)
Plaintiffs,	**DEFENDANT LETHA A.S. DECAIRES' SUBSTANTIVE JOINDER TO DEFENDANT CHARLES W. TOTTO'S MOTION TO STRIKE VERIFIED COMPLAINT AND/OR PORTIONS THEREOF FILED SEPTEMBER 21, 2016; CERTIFICATE OF SERVICE**
vs.	
CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission; LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission; HONOLULU ETHICS COMMISSION; and THE CITY AND COUNTY OF HONOLULU,	**HEARING** **DATE:** November 18, 2016 **TIME:** 3:00 p.m. **JUDGE:** Hon. Gary W.B. Chang
Defendants.	No Trial Date Set

DEFENDANT LETHA A.S. DECAIRES' SUBSTANTIVE JOINDER TO DEFENDANT CHARLES W. TOTTO'S MOTION TO STRIKE VERIFIED COMPLAINT AND/OR PORTIONS THEREOF FILED SEPTEMBER 21, 2016

Pursuant to Rule 7(b) of the Hawaii Rules of Civil Procedure and Rule 7.2(g) of the Rules of the Circuit Courts of the State of Hawaii, Defendant LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission ("**Defendant**"), by and through her attorneys Kobayashi Sugita & Goda, LLP, hereby submits this substantive joinder in Defendant CHARLES W. TOTTO ("**Totto**")'s Motion to Strike Verified Complaint and/or Portions Thereof Filed September 21, 2016 ("**Motion**").

Defendant respectfully requests that the Court grant Totto's Motion and strike in their entirety paragraphs 6-19, 37-38, 42-50(c), 67-70, 99(j)-(l) from the Verified Complaint as being immaterial and impertinent. In addition, and to the extent the Court does not strike the aforementioned paragraphs in their entirety, Defendant respectfully requests that the Court strike the bolded text in paragraphs 6, 9, 17, 42-44, 47-48, and 52, as identified on pages 5-6 of Toto's Memorandum in Support of his Motion, as being unnecessarily inflammatory and scandalous.

DATED: Honolulu, Hawaii, November 9, 2016.

DAVID M. LOUIE
NICHOLAS R. MONLUX

Attorneys for Defendant
LETHA A.S. DECAIRES,
individually and as investigator
for the Honolulu Ethics Commission

1491061-2

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA, Plaintiffs, vs. CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission; LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission; HONOLULU ETHICS COMMISSION; and THE CITY AND COUNTY OF HONOLULU, Defendants.	CIVIL NO. 16-1-1166-6 GWBC (Non-Motor Vehicle Tort) **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a true and correct copy of the foregoing document was duly served upon the following parties at their last known addresses, via hand-delivery or via United States mail, postage prepaid:

	HAND DELIVERY	U.S. MAIL
Kevin P.H. Sumida, Esq. Anthony L. Wong, Esq. Lance S. Au, Esq. Stephen K. Roy, Esq. SUMIDA AU & WONG 735 Bishop Street, Suite 411 Honolulu, Hawaii 96813 Attorneys for Plaintiffs	X	

	HAND DELIVERY	U.S. MAIL
RICHARD F. NAKAMURA, ESQ. Chong, Nishimoto, Sia, Nakamura & Goya 1003 Bishop Street, Suite 2500 Honolulu, Hawaii 96813 Attorneys for Defendants HONOLULU ETHICS COMMISSION and CITY AND COUNTY OF HONOLULU	X	
JOACHIM P. COX, ESQ. ROBERT K. FRICKE, ESQ. KAMALA S. HAAKE, ESQ. Cox Fricke LLP 800 Bethel Street, Suite 600 Honolulu, Hawaii 96813 Attorneys for Defendant CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission	X	

DATED: Honolulu, Hawaii, November 9, 2016.

DAVID M. LOUIE
NICHOLAS R. MONLUX

Attorneys for Defendant
LETHA A.S. DECAIRES,
individually and as investigator
for the Honolulu Ethics Commission

EXHIBIT "5"

EXHIBIT "5"

FIRST CIRCUIT COURT
STATE OF HAWAII
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F. OTAKE
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A LIMITED LIABILITY LAW PARTNERSHIP LLP

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA,

Plaintiffs,

vs.

CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission; LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission; HONOLULU ETHICS COMMISSION; and THE CITY AND COUNTY OF HONOLULU,

Defendants.

CIVIL NO. 16-1-1166-6 GWBC
(Non-Motor Vehicle Tort)

DEFENDANT CHARLES W. TOTTO'S SUBSTANTIVE JOINDER IN DEFENDANTS HONOLULU ETHICS COMMISSION AND CITY AND COUNTY OF HONOLULU'S MOTION FOR MORE DEFINITE STATEMENT AND MOTION TO STRIKE FILED ON JULY 11, 2016; MEMORANDUM IN SUPORT OF MOTION; CERTIFICATE OF SERVICE

DATE: ~~October 4, 2016~~ November 18, 2016 wf
TIME: 3:00 p.m.
JUDGE: Hon. Gary W.B. Chang

No Trial Date Set

DEFENDANT CHARLES W. TOTTO'S SUBSTANTIVE JOINDER IN DEFENDANTS HONOLULU ETHICS COMMISSION AND CITY AND COUNTY OF HONOLULU'S MOTION FOR MORE DEFINITE STATEMENT AND MOTION TO STRIKE FILED ON JULY 11, 2016

Pursuant to Rule 7(b) of the Hawai'i Rules of Civil Procedure, Defendant Charles W. Totto ("Mr. Totto"), by and through his attorneys, Cox Fricke LLP, hereby submits his substantive joinder to Defendants Honolulu Ethics Commission and City and County of Honolulu's (collectively "City") Motion for More Definite Statement and Motion to Strike filed on July 11, 2016 ("Motion"). Specifically, Mr. Totto requests that if the Court grants City's Motion, the Court also grant the same relief to Mr. Totto on the same basis.

This substantive joinder is based upon the attached memorandum of law, the record and file in this action, and such other evidence and argument as may be presented at the hearing on this Motion.

DATED: Honolulu, Hawai'i, September 21, 2016.

JOACHIM P. COX
ROBERT K. FRICKE
KAMALA S. HAAKE

Attorneys for Defendant
CHARLES W. TOTTO

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA, Plaintiffs, vs. CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission; LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission; HONOLULU ETHICS COMMISSION; and THE CITY AND COUNTY OF HONOLULU, Defendants.	CIVIL NO. 16-1-1166-6 GWBC (Non-Motor Vehicle Tort) MEMORANDUM IN SUPORT OF MOTION

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Plaintiffs' Verified Complaint is replete with purported factual allegations regarding actions that Defendants Charles W. Totto, Letha A. S. DeCaires, the Honolulu Ethics Commission, and the City and County of Honolulu (collectively, "Defendants") took in, among other things, investigating Plaintiffs for alleged ethics violations. However, the Verified Complaint—which is 43 pages long and includes over 1,000 pages of exhibits—is so prolix that it is impossible for Mr. Totto to discern what causes of action are being asserted against him, especially since it does not specifically enumerate any causes of action. Consequently, the Verified Complaint violates Rule 8 of the

Hawai'i Rules of Civil Procedure ("HRCP"), which requires complaints to contain "short and plain" statements of the claim.

Compounding the issues with the Verified Complaint is that it reads more like a fictional story interspersed with gratuitous legal terms and references to rules rather than a complaint. In light of the argumentative and inflammatory allegations, the Verified Complaint cannot be construed as a method of providing notice to Mr. Totto of the claims against him. Rather, the purpose of the Verified Complaint can only be to spout vitriol about Mr. Totto. The story is written so that the reader sympathizes with the Plaintiffs, who claim to merely be the victims of Mr. Totto's allegedly "vindictive, unsubstantiated and illegal investigations," and cast aspersions on Mr. Totto, who allegedly is a "corrupt" director "[b]esotted by unchecked power[.]" Such inflammatory (and unnecessary) allegations—in addition to being improper under Rule 8—obscure the essential factual allegations that should otherwise comprise any claims that Plaintiffs have against Mr. Totto. Accordingly, the Verified Complaint should be dismissed, and, should leave to amend be granted, Plaintiffs should be compelled to abide by the mandates of Rule 8 rather than resorting to overly dramatized storytelling. Should the Court not dismiss the Verified Complaint in its entirety, the Court should strike the exhibits to the Verified Complaint and any allegations regarding third parties.[1]

[1] The Ethics Commission and City and County of Honolulu argue that allegations regarding third parties should be stricken, as well as the exhibits to the Verified Complaint. Mr. Totto agrees and joins the Ethics Commission and City's Motion and also, by way of his own motion filed concurrently herewith, requests that the entire Verified Complaint be stricken because it contains immaterial, impertinent, and/or scandalous allegations.

II. ARGUMENT

The "traditional pleading style" for a complaint requires a "short and plain statement of basic allegations followed by an outline of each legal claim based on specific allegations of fact." *McHenry v. Renne*, 84 F.3d 1172, 1176 (9th Cir. 1996); *see also* Haw. R. Civ. Proc. 8(a)(1) (requiring "a short and plain statement of the claim showing that the pleader is entitled to relief"); Haw. R. Civ. Proc. 8(e)(1) ("Each averment of a pleading shall be simple, concise, and direct."). Where a complaint fails to comply with this requirement, the Court may dismiss the complaint in its entirety. *See Silver v. Queen's Hospital*, 53 F.R.D. 223, 225 (D. Haw. 1971).[2] The Verified Complaint is devoid of any "short and plain statements of basic allegations," nor does it contain an outline of Plaintiffs' legal claims.[3] Although Plaintiffs contend that their Verified Complaint is sufficient under Rule 8, as the court in *McHenry v. Renne* found, there is a difference between pleading a "short and plain" statement of a claim and a complaint that is "argumentative, prolix, replete with redundancy, and largely irrelevant." 84 F.3d at 1177. Here, the Verified Complaint consists of 43 pages of "evidentiary, argumentative and other unnecessary allegations" that "impair[] or preclude[]" the "understanding of and procedure based on the essential allegations . . ." *Silver*, 53 F.R.D. at 225. Such allegations are insufficient to meet the pleading requirements of Rule 8.

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[2] HRCP Rule 8(a)(1) is identical to Rule 8(a)(2) of the Federal Rules of Civil Procedure.

[3] Plaintiffs' reliance on Rule 8(e)(2) is misplaced. Rule 8(e)(2) provides only that a plaintiff may plead in the alternative. Haw. R. Civ. Proc. 8(e)(2). ("A party may set forth "two or more statement of a claim or defense ***alternatively or hypothetically***, either in one count or defense or in separate counts or defenses." (emphasis added)). Plaintiffs' interpretation ignores the first clause of the sentence. Regardless, even focusing solely on the second clause, requiring alternative claims to be pled "either in one count . . . or in separate counts . . .", Plaintiffs have failed to do even this, as there are ***no*** counts alleged in the Verified Complaint. *See, e.g.*, *Baham v. Ass'n of Apt. Owners of Opua Hale Patio Homes*, Civ. No. 13-00669 HG-BMK, 2014 U.S. Dist. LEXIS 82873, at *17 (D. Haw. June 18, 2014) ("A Rule 12(e) motion may be appropriate when a plaintiff's claims are not divided into separate counts based on each separate transaction or occurrence[.]").

Nor is there any excuse for the long-winded and argumentative Verified Complaint. This is not the situation where the Verified Complaint was drafted by a pro se party. In those instances, trial courts must construe the pleadings liberally and may take it upon themselves to "search[] to find essential allegations if they can be found." *Id.* at 226. Here, however, Plaintiffs' attorneys are "mature and extensively experienced attorneys." *Id.* As such, they are "required to be fully informed and have a professional duty to comply with [] rules of procedure." *Id.* To that end, "their work product must reasonably conform to and be judged in light of rule requirements." *Id.* As the court in *Silver v. Queen's Hospital* aptly stated:

> When attorneys . . . prepare complaints, neither the Court nor opposing counsel should be required to expend time and effort searching through large masses of conclusory, argumentative, evidentiary and other extraneous allegations in order to discover whether the essentials of claims asserted can be found in such a mélange. ***It is the duty and responsibility, especially of experienced counsel, to state those essentials in short, plain and nonredundant allegations.***

Id. (emphasis added and citations omitted).

The Verified Complaint is rife with "unnecessary allegations couched in argumentative, inflammatory and conclusory terms." *Id.* In particular, the apparent purpose of the Verified Complaint is to vilify Mr. Totto. Rather than plainly alleging what actions Mr. Totto took, why those actions were wrongful, and how those actions damaged Plaintiffs, Plaintiffs have instead engaged in a mud-slinging campaign, portraying Mr. Totto as a director "besotted by unchecked power" who

> abused his position to help himself and his friends and allies, punish his enemies and those who would not comply with his demands, exempt himself from the standards of conduct applicable to all other city employees, and terrorize city employees by way of disparate and inconsistent application of the Standards of Conduct.

Compl. ¶ 17. Incendiary and argumentative allegations such as these abound in the Verified Complaint.[4] What is especially troubling is that the allegations are purportedly

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[4] Other examples of argumentative allegations meant to sully Mr. Totto's reputation include, but are not limited to, the following:

- "With callous disregard for the lives and reputations of others, and the demoralizing effect [Mr. Totto's and Ms. DeCaires's] vicious conduct has had on a number of County agencies and employees, both Totto and DeCaires have to date committed serious ethical, moral and professional violations with impunity." Compl. ¶ 9.
- "Given the level of destruction and terror caused by these flagrantly irresponsible individuals, the negative repercussions of their actions will be evident for some time." *Id.* ¶ 10.
- "As Executive Direct and chief Legal Counsel for the Ethics Commission, defendant Totto has knowingly mislead [sic] and deceived the Commissioners of the Ethics Commission, who are unpaid volunteer public spirited individuals who receive no benefit for their services other than that which derives from service to the community." *Id.* ¶ 12.
- "With his claim of superior knowledge of the applicable laws and procedures, his ability to control the information provided to the Commissioners, and his ability, nurtured over the years, to leak information to his friends and sycophants in the media in order to obtain a favorable news story, Totto has, over the years, effectively undermined the power and prerogatives of the Board." *Id.* ¶ 14.
- "While having no choice as to the conclusion of illegality, Totto then did something completely unprecedented: he gave his friend a way out . . ." *Id.* ¶ 31.
- "Having no purpose but to shame others, Totto would take his Trophy Board to seminars and presentations conducted under the auspices of the Ethics Commission, singling these employees out for special public humiliation and approbation, and to brag about having prosecuted them for ethical violations." *Id.* ¶ 43.
- "Totto was less interested in educating city employees as to their ethical requirements, than in creating a reign of terror." *Id.* ¶ 44.
- "Totto was clearly embarrassed by plaintiff's complaint to the Managing Director, and has since then schemed to exact his revenge." *Id.* ¶ 47.
- "Totto's dissembling as to the scope and nature of the investigations of plaintiffs, and his

pleaded as facts, since Plaintiff Katherine Kealoha has verified the contents of the complaint. *See* Compl. at 44. Moreover, given the media frenzy following Plaintiffs, the inflammatory allegations in the Verified Complaint—a complaint that contains a demand for jury trial—have been widely disseminated throughout the State. As such, it is extremely prejudicial to Mr. Totto not only because Mr. Totto is unable to discern what claims are being alleged against him, but also because the Verified Complaint in all likelihood has tainted the public against him.

For these reasons, the Verified Complaint cannot stand as written. At 43 pages long, not including an additional 1,072 in exhibits (many of which are duplicative),

> defendants would be unable to file meaningful answers to much of what is alleged. They would be forced to reply in kind by pleading further prolix matter. The issues would be obscured and remain undefined. This would lead to wasteful and unnecessary pretrial discovery, after which a pretrial judge would at some point face the necessity of requiring the plaintiffs to clarify and redefine their contentions.

Silver, 53 F.R.D. at 226 (quoting *Johnson v. Hunger*, 266 F. Supp. 590, 591 (S.D.N.Y. 1967)); *see also McHenry*, 84 F.3d at 1178 ("If the pleading contains prolix evidentiary averments, largely irrelevant or of slight relevance, rather than clear and concise averments stating which defendants are liable to plaintiffs for which wrongs, based on the evidence, then this purpose [of avoiding unnecessary discovery] is defeated."). Indeed, if

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resulting juggling of two diametrically opposite characterizations of the investigations to suit his needs, could not be sustained. Once the actual facts of the matters began to be exposed to the Ethics Commission, Totto was unable to maintain his convenient fictions, and both he and his stories collapsed under the weight of his own deceptions. Thereafter, Totto abruptly went out on 'medical leave' completely unable to meet any of the previously established deadlines or attend further hearings in the contested cases." *Id.* ¶ 76.

Mr. Totto is forced to respond to the Verified Complaint, because the claims are not specifically enumerated, he runs the risk of completely missing a claim and being unfairly surprised at trial. *See McHenry*, 84 F.3d at 1179-80. As such, the Verified Complaint should be dismissed.

III. CONCLUSION

For all the foregoing reasons, as well as those set forth in Defendants Honolulu Ethics Commission and City and County of Honolulu's Motion for More Definite Statement and Motion to Strike, Mr. Totto respectfully requests that the Court grant the Motion and afford Mr. Totto the same relief as the Ethics Commission and the City and County of Honolulu.

DATED: Honolulu, Hawai'i, September 21, 2016.

JOACHIM P. COX
ROBERT K. FRICKE
KAMALA S. HAAKE

Attorneys for Defendant
CHARLES W. TOTTO

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA, Plaintiffs, vs. CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission; LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission; HONOLULU ETHICS COMMISSION; and THE CITY AND COUNTY OF HONOLULU, Defendants.	CIVIL NO. 16-1-1166-6 GWBC (Non-Motor Vehicle Tort) CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the within document was served on this date in the following manner:

	HAND DELIVERED	MAILED
KEVIN P.H. SUMIDA, ESQ. ANTHONY L. WONG, ESQ. LANCE S. AU, ESQ. STEPHEN K. ROY, ESQ. Sumida Au & Wong 735 Bishop Street, Suite 411 Honolulu, Hawaiʻi 96813 Attorneys for Plaintiffs	[X]	[ ]

	HAND DELIVERED	MAILED
DONNA Y.L. LEONG, ESQ. Corporation Counsel PAUL S. AOKI, ESQ. ROBERT M. KOHN, ESQ. Deputies Corporation Counsel City and County of Honolulu 530 South King Street, Room 10 Honolulu, Hawaiʻi 96813 Attorneys for Defendants HONOLULU ETHICS COMMISSION and CITY AND COUNTY OF HONOLULU	[X]	[ ]
DAVID M. LOUIE, ESQ. Kobayashi Sugita & Goda, LLP 999 Bishop Street, Suite 2600 Honolulu, Hawaiʻi 96813 Attorney for Defendant LETHA A.S. DECAIRES	[X]	[ ]

DATED: Honolulu, Hawaiʻi, September 21, 2016.

JOACHIM P. COX
ROBERT K. FRICKE
KAMALA S. HAAKE

Attorneys for Defendant
CHARLES W. TOTTO

EXHIBIT “6”

EXHIBIT "6"

Of Counsel:
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KATHERINE E. KEALOHA, and
KRISTINA KEALOHA, a minor child,
by her next friend, KATHERINE E. KEALOHA

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA, Plaintiffs, vs. CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission; LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission; HONOLULU ETHICS COMMISSION; and THE CITY AND COUNTY OF HONOLULU, Defendants.	CIVIL NO. 16-1-1166-6 GWBC (Non-Motor Vehicle Tort) CERTIFICATE OF SERVICE PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS LETHA A.S. DECAIRES, INDIVIDUALLY AND AS INVESTIGATOR FOR THE HONOLULU ETHICS COMMISSION'S MOTION (A) FOR MORE DEFINITE STATEMENT, (B) TO STRIKE, AND (C) TO JOIN DEFENDANTS HONOLULU ETHICS COMMISSION AND CITY AND COUNTY OF HONOLULU'S MOTION FOR MORE DEFINITE STATEMENT AND MOTION TO STRIKE; CERTIFICATE OF SERVICE DATE: 11/18/2016 TIME: 3:00 P.M. JUDGE: Hon. Gary W.B. Chang Trial Date: not yet set

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS LETHA A.S. DECAIRES, INDIVIDUALLY AND AS INVESTIGATOR FOR THE HONOLULU ETHICS COMMISSION'S MOTION (A) FOR MORE DEFINITE STATEMENT, (B) TO STRIKE, AND (C) TO JOIN DEFENDANTS HONOLULU ETHICS COMMISSION AND CITY AND COUNTY OF HONOLULU'S MOTION FOR MORE DEFINITE STATEMENT AND MOTION TO STRIKE

There is more than a bit of irony to note the inconsistency in the defendants' various positions. While complaining on the one hand that the complaint herein is not "short" enough and contains too much information, defendants also complain that there is *not enough* information to be able to answer.

But Defendants apparently seek a form of summary judgment before the plaintiffs have had any opportunity to conduct discovery. For example, plaintiffs have some information that defendant DeCaires, while conducting "interviews" for her so-called investigation, actually used the opportunity to slander and defame the defendants, accusing them of violating tax laws and other laws. This is described in the complaint:

> 80. In her unlawful zeal to create any ethical violation whether real or manufactured, and as evidence of her conflict of interest and improper motives, and with the full approval of and ratification by Totto, DeCaires violated the rights of HPD officers, witnesses and the plaintiffs, provided false and defamatory information to witnesses and others, violated Garrity rights of witnesses and plaintiffs, violated the laws and procedures of the Ethics Commission, shared confidential as well as fabricated information with others, and improperly caused the adult plaintiffs to be involved in other proceedings and investigations, all while continuing to benefit from the continued renewal of her 89 day contracts. Exhibit 41.
>
> * * *
>
> 84. DeCaires and Totto engaged in far reaching, extensive and disruptive investigations which were designed to disrupt, poison the minds of witnesses and harass rather than reveal, all causing damage to basic

rights of the plaintiffs and others. Illegal investigations and actions by DeCaires and/or Totto included:

a) So-called "interviews" of witnesses by DeCaires, where the witnesses were asked few real questions, and instead were provided knowingly false and defamatory "facts" which was intended to, and did accomplish, disruption to plaintiff Louis Kealoa's command, to plaintiff Katherine Kealoha's work place, and to the minor plaintiff's school environment, as well as damage their professional standing and reputations. Exhibit 42.

b) Making knowingly false statements by DeCaires in one or more sworn declarations filed with the Ethics Commission, including her false claim that plaintiff Louis Kealoha was a subject of an ethics investigation in 2013. Exhibits 46, 62.

c) Making knowing false statements by Totto to his attorney that plaintiff Katherine Kealoha had previous ethics violations. Exhibits 30, 59.

***

99. These illegal and improper investigations resulted in no discovery of any violation of the Standards of Conduct. Exhibit 37, 30, 42, 32, 45, 47, 48, 49, 50, 51, 52, 53,54, 55, 61, 62, 67. But in the course of these illegal investigations:

a) Totto and/or DeCaires deliberately made false and defamatory statements about plaintiff to third parties, with the purpose and effect of placing plaintiffs in a false light, damaging the personal and professional reputations of plaintiffs, and causing such third parties to question the integrity of plaintiffs. In some instances, employees under the command of plaintiff Louis Kealoha, transferred out of specific divisions or retired, rather than work under one whose integrity was called into question by the Ethics Commission investigator;

b) Employees under the command of plaintiff Louis Kealoha were specifically targeted and harassed by the DeCaires, simply because they were unwilling to "lie" and "create false claims," against the Plaintiffs as Totto and DeCaires implied;

c) Totto and/or DeCaires deliberately made false and defamatory statements about plaintiff to other state and federal agencies, for the purpose and with the effect of causing plaintiffs to be embroiled in litigation and/or adversary actions by such agencies and/or to create a conflict of interest which would disqualify such agencies from investigating the defendants themselves;

d) Totto and/or DeCaires deliberately and improperly leaked confidential and false information to the federal authorities and to the federal public defender;

Where information is already available to plaintiffs, documents are referenced in the relevant paragraphs of the complaint, and attached as exhibits to the complaint. Additional documents and details must necessarily await discovery. Nevertheless, defendants' claim that they do not have sufficient detail as to what defamatory statements are at issue, given the current stage of the proceedings, seems to ring rather hollow.

What is at issue in this case is a wide ranging actions by defendants Totto and DeCaires to abuse their positions in an attempt to misuse the investigative and salutary powers of the Ethics Commission. Their wrongdoing was staggering in scope, and included a punitive and vindictive series of "investigations" conducted against the plaintiffs and their places of employment and (in the case of the minor plaintiff) school. All were conducted for improper purposes, and implemented improperly as well. As best as can be determined, there were at least 19 wrongful investigations, all without the knowledge and approval of the Honolulu Ethics Commission. Evidence is expected to show that commission members were unaware of the number and scope of these investigations, and were shocked when they learned of them.

To give the defendants' notice of the wide ranging scope of the wrongdoing at issue, Plaintiffs have alleged, and where possible with the information they possess, have documented in great detail what they know.

As noted in plaintiff's memorandum filed in opposition to the City's parallel motion, the Hawaii Rules of Civil Procedure require simply that "pleadings must be construed liberally and not technically." *Island Holidays v. Fitzgerald*, 58 Haw. 552, 567, 574 P.2d 884 (Haw. 1978).

> Under Hawai'i's "notice pleading" approach, it is "no longer necessary to plead legal theories with . . . precision." *Leslie v. Estate of Tavares*, 93 Hawai'i 1, 4, 994 P.2d 1047, 1050 (2000). "Hawaii's rules of notice pleading require that a complaint set forth a short and plain statement of the claim that provides defendant with fair notice of what the plaintiff's claim is and the grounds upon which the claim rests. Pleadings must be construed liberally." *Genesys Data Technologies, Inc. v. Genesys Pac. Technologies, Inc.*, 95 Hawai'i 33, 41, 18 P.3d 895, 903 (2001) (citations omitted); *see also Hall v. Kim*, 53 Haw. 215, 221, 491 P.2d 541, 545 (1971) (holding it is "not necessary to plead under what particular law the recovery is sought"). Moreover, consistent with the mandate of HRCP Rule 8(f) that "[a]ll pleadings shall be so construed as to do substantial justice," the Hawai'i Supreme Court has rejected "the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and in turn accepted the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Hall*, 53 Haw. at 221, 491 P.2d at 545 (internal quotation marks and citation omitted).

Tokuhisa v. Cutter Mgmt. Co., 122 Haw. 181, 192, 223 P.3d 246 (Haw. Ct. App. 2009).

For the reasons stated, plaintiffs respectfully pray that the defendants' motion be denied.

DATED: HONOLULU, HAWAII, November 10, 2016.

KEVIN P. H. SUMIDA
ANTHONY L. WONG
Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA, Plaintiffs, vs. CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission; LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission; HONOLULU ETHICS COMMISSION; and THE CITY AND COUNTY OF HONOLULU, Defendants.	CIVIL NO. 16-1-1166-6 GWBC (Non-Motor Vehicle Tort) CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was duly served on the following attorney(s) by hand delivering same or by placing the same in the United State mail, postage prepaid on this 10th day of November 2016:

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DATED: HONOLULU, HAWAII, November 10, 2016

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EXHIBIT "7"

EXHIBIT "7"

FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

2016 JUL 26 PM 3:33

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

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LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA, Plaintiffs, vs. CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission; LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission; HONOLULU ETHICS COMMISSION; and THE CITY AND COUNTY OF HONOLULU, Defendants.	CIVIL NO. 16-1-1166-6 GWBC (Non-Motor Vehicle Tort) PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS HONOLULU ETHICS COMMISSION AND CITY AND COUNTY OF HONOLULU'S MOTION FOR MORE DEFINITE STATEMENT AND MOTION TO STRIKE; CERTIFICATE OF SERVICE DATE: 8/1/2016 TIME: 3:00 P.M. JUDGE: Hon. Gary W.B. Chang Trial Date: not yet set

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS HONOLULU ETHICS COMMISSION AND CITY AND COUNTY OF HONOLULU'S MOTION FOR MORE DEFINITE STATEMENT AND MOTION TO STRIKE

Before this Honorable Court is what appears to be a canned memo from the defendants the City and County of Honolulu, and the Honolulu Ethics Commission, seeking to both strike the complaint and exhibits, and receive a "more definite statement."

The subject complaint details a long and complex history of corruption and abuse of power by Defendants Charles Totto and his then-investigator, Letha DeCaires. Spanning several years and some nineteen bogus investigations (none of which resulted in any finding of wrongdoing), Totto and DeCaires presented false and/or fabricated information to various City, State and federal agencies and to persons to whom they spoke or who were interviewed by them. For example, two false accusations are described in the complaint:

1. DeCaires falsely accused the plaintiffs of having an undisclosed business relationship with an HPD officer with respect to a solar water hearing company. This false accusation was made to Police Chief Louis Kealoha's second in command, and severely impacted their professional working relationship. A transcript of the interview, in which DeCaires is quoted as making this false accusation, is attached to the complaint.
2. Totto/DeCaires falsely informed the state taxing authorities that the plaintiffs had improperly claimed solar tax credits based upon the

fabricated claim that three was an improper business relationship noted above. This caused the plaintiffs to be audited by the taxing authorities. At the conclusion of the audit, when no tax improprieties were found, the representative from the taxing authority stated to plaintiffs words to the effect that this was the first time a fellow government agency had provided false information to it.

The complaint alleges and plaintiffs will show, that the investigations were instituted in violation of the procedures and requirements specified in the relevant City ordinances. Defendants Totto and DeCaires were given free rein to institute and pursue these bogus investigations because, as its Executive Director and Chief Legal Counsel, Totto had deceived the Honolulu Ethics Commission members as to the applicable legal standards. Under his stewardship, ethics investigations could be commenced or not commenced on no more than his whim.

Totto benefited in many ways by this control over what and when ethics investigations were launched. The subject complaint details instances where he exempted himself from clear requirements of the law (such as his legal requirement to file public financial disclosures, which he has never done), even while chastising or punishing others for ethical violations of which he was himself guilty (such as using official letterhead to write a letter of recommendation).

The subject complaint details how false information fed by Totto/DeCaires, and given extra weight because provided under the auspices of the Honolulu Ethics Commission, launched a federal probe of the plaintiffs which, after a year of fruitless digging by the FBI, has lead to nothing except untold damage to the plaintiffs, and significant disruption to the operations of two key law enforcement agencies.

Defendants City and the Ethics Commission get into trouble when they deviate from their canned memorandum to address the specific complaint in question. They claim that the subject complaint is "vague, ambiguous, prolix, [and] confusing, " because there are "no counts" which segregate the allegations by causes of action. But rule 8 of the Hawaii Rules of Civil Procedure, which the defendants quote quite liberally in the canned portion of their memorandum, makes clear that such structural organization, while perhaps easier for the indolent, is not required:

> (2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, ***either in one count or defense or in separate counts or defenses.*** When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

H.R.Civ.P. Rule 8(e)(2) (emphasis supplied).

Defendants want a pleading which "can be read in seconds and answered in minutes." Defendant's opening memorandum at 8. But the Hawaii Rules of Civil Procedure contain no such requirement. Instead, Hawaii courts require simply that "pleadings must be construed liberally and not technically." *Island Holidays v. Fitzgerald*, 58 Haw. 552, 567, 574 P.2d 884 (Haw. 1978).

> Under Hawai'i's "notice pleading" approach, it is "no longer necessary to plead legal theories with . . . precision." *Leslie v. Estate of Tavares*, 93 Hawai'i 1, 4, 994 P.2d 1047, 1050 (2000). "Hawaii's rules of notice pleading require that a complaint set forth a short and plain statement of the claim that provides defendant with fair notice of what the plaintiff's claim is and the grounds upon which the claim rests. Pleadings

> must be construed liberally." *Genesys Data Technologies, Inc. v. Genesys Pac. Technologies, Inc.*, 95 Hawai'i 33, 41, 18 P.3d 895, 903 (2001) (citations omitted); *see also Hall v. Kim*, 53 Haw. 215, 221, 491 P.2d 541, 545 (1971) (holding it is "not necessary to plead under what particular law the recovery is sought"). Moreover, consistent with the mandate of HRCP Rule 8(f) that "[a]ll pleadings shall be so construed as to do substantial justice," the Hawai'i Supreme Court has rejected "the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and in turn accepted the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Hall*, 53 Haw. at 221, 491 P.2d at 545 (internal quotation marks and citation omitted).

Tokuhisa v. Cutter Mgmt. Co., 122 Haw. 181, 192, 223 P.3d 246 (Haw. Ct. App. 2009).

Defendants then begin to contradict themselves, alternatively arguing that the complaint contains "too much" information, and must therefore be stricken, and simultaneously claiming that there is "not enough" information for them to file a motion to dismiss. If all that is required is a "short and plain" statement, as the defendants insist in the first part of their memorandum, then it is improper for them to insist that the complaint contain a more etailed description of the legal nature of the claim.

Reading between the lines, what the defendants really seek is for plaintiffs to package the complaint into neat little packages of facts, legal theories, and prayers for relief. But the rules do not, and should not, require such artificial segmentation of the plaintiffs' claims, especially when, as noted above, the facts and circumstances at issue are themselves long, complex, interrelated, and occurring over a lengthy period of time.

With respect to the defendants' distress that the subject complaint does not contain enough detailed legal analysis to determine the merits of plaintiffs' claims for injunctive and declaratory relief, the plaintiffs are prepared to submit a comprehensive legal memorandum which explains just how the Ethics Commission has been violating its own procedures and statutory requirements. Such a comprehensive legal memorandum is appropriately filed, not as part of the Complaint, which requires a recitation of facts, but as part of a legal memorandum filed at the appropriate time.

Plaintiffs claim that there is no discussion of exactly what defamatory statements were made. The complaint makes clear that defamatory statements included: falsely claiming that plaintiff Louis Kealoha was a subject of an ethics investigation in 2013, Complaint at paragraph 84(b), that Katherine Kealoha had previous ethics violations Complaint at paragraphs 84(c) and 101(d), falsely informing the media that subpoenas for supposedly confidential ethics commission hearings were issued to intimidate "whistleblowers" when in fact no "whistleblowers" were subpoenaed, or served, Complaint at paragraph 101(b).

In some instances, the false accusations are discussed in detail in exhibits attached and referenced in the complaint. In other instances, the evidence of false accusations made by Totto/DeCaires are based upon hearsay evidence, and so cannot be precisely stated at present. The evidence of these false and defamatory accusations will be found in the investigatory files of the Ethics Commission, including transcripts of witnesses, which have yet to be obtained from defendants, and which defendants have, prior to the instant litigation, refused to produce to plaintiffs. In their memorandum in support of the instant motion, defendants still claim that such records are confidential, that they need not disclose the defamatory statements in those records, and that the instant complaint should be dismissed because plaintiffs cannot accurately quote the defamatory statements found in the records which they refuse to produce.

Defendants next claim that they do not know what is meant by "Standards of Conduct." This is a preposterous claim, made in bad faith. The Standards of Conduct are specified in Article XI of the City Charter (entitled "**Standards of Conduct**"), and is applicable to all City employees. Moreover, one of the very statutes under which the Honolulu Ethics Commission (movant herein) operates, is Chapter 3, Article 8 of the Revised Ordinances of Honolulu, provides Additional "Standards of Conduct" for all City employees, and is specifically entitled "**Additional Standards of Conduct.**" Finally, Section 3-5.10 of the Revised Ordinances provides for training of officers and employees of the City as to "standards of conduct."

As noted, all City employees, especially the City's legal representatives, would presumably be completely familiar with both the term "Standards of Conduct" and what ethical requirements are imposed upon all City employees by such Standards of Conduct, and know that violation of the same will result in fines imposed by the Honolulu Ethics Commission. The fact that the Honolulu Ethics Commission, through its legal counsel, can somehow claim that they do not know what the term "Standards of Conduct" means is simply the plainest evidence of the insincerity of the instant motion.

The defendants next claim that the records of the Ethics Commission are confidential. But, as noted in the subject complaint, such confidentiality was honored mostly in the breach by defendants Totto and DeCaires, with the acquiescence of the defendants the Honolulu Ethics Commission and the City and County of Honolulu. As noted in the Complaint, Information was illegally leaked to witnesses, to state agencies, to city agencies and employees, and to federal agencies, all for the purpose and with the effect of damaging the plaintiffs.

It is true that plaintiffs have made reference to numerous exhibits attached to he complaint, for the purpose of providing more detail and evidence and backup for the stated allegation. Defendants now propose that, for their convenience, these exhibits be stricken, and presumably, to make up for the resulting lack of detail, the complaint be lengthened further by incorporation of the details referenced in those exhibits into the body of the complaint. Or perhaps the defendants seek to strike the exhibits and then strike the corresponding allegations of the complaint because of lack of sufficient informaton. In either event, the court is urged to reject the defendants' apparent gamesmanship. "All pleadings shall be so construed as to do substantial justice." H.R.Ci.P. Rule 8(f).

For the reasons stated, plaintiffs respectfully pray that the defendants' motion be denied.

DATED: HONOLULU, HAWAII, JUL 2 6 2016

for KEVIN P. H. SUMIDA
ANTHONY L. WONG
Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA, Plaintiffs, vs. CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission; LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission; HONOLULU ETHICS COMMISSION; and THE CITY AND COUNTY OF HONOLULU, Defendants.	CIVIL NO. 16-1-1166-6 GWBC (Non-Motor Vehicle Tort) CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was duly served on the following attorney(s) by hand delivering same or by placing the same in the United State mail, postage prepaid on this 26th day of July 2016:

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EXHIBIT "8"

EXHIBIT "8"

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA, Plaintiffs, vs. CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission; LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission; HONOLULU ETHICS COMMISSION; and THE CITY AND COUNTY OF HONOLULU, Defendants.	CIVIL NO. 16-1-1166-6 GWBC (Non-Motor Vehicle Tort) CERTIFICATE OF SERVICE PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS CHARLES W. TOTTO'S MOTION TO STRIKE VERIFIED COMPLAINT AND/OR PORTIONS THEREOF; CERTIFICATE OF SERVICE DATE: 11/18/2016 TIME: 3:00 P.M. JUDGE: Hon. Gary W.B. Chang Trial Date: not yet set

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS CHARLES W. TOTTO'S MOTION TO STRIKE VERIFIED COMPLAINT AND/OR PORTIONS THEREOF

This lawsuit is about a defendant, Charles Totto, who for many years was able to, with impunity, conduct targeted and illegal investigations based upon an unsanctioned agenda, without proper oversight by the Honolulu Ethics Commission. It is about the systemic misuse of his authority, as the Director of the Honolulu Ethics Commission, to whitewash wrongdoing by himself and his friends, and consolidate his power by the use of targeted investigations. One target of the defendants' investigation was the plaintiffs, and the complaint details how defendant Totto found, in revengeful defendant DeCaires, the perfect tool to pursue his goals by conducting investigations which were both illegal and oppressive.

Investigation after investigation were launched by defendant Totto and DeCaires, all illegally initiated, all lacking oversight by the Honolulu Ethics Commission, and all ultimately to no avail. Over the course of two years, defendants opened 19 investigations of the plaintiffs, including those of witnesses who refused to "cooperate" with such investigations. Interestingly, the evidence is expected to show that the Commissioners of the Ethics Commission were unaware of these investigations and were shocked when they first learned of them.

In conducting these investigations, the defendants turned at the two city agencies, at which they were employed, upside down in their vain attempt to find wrongdoing, wrongfully interfering with plaintiff's existing contractual relationships and prospective economic advantage. Defendants also gave false and defamatory information to agencies and individuals.

The complaint contains allegations which detail, as much as is presently known, the extensive and systemic wrongdoing of the defendants. Defendant Totto claims, in his memorandum at 2, that such allegations are superfluous and inserted merely for "color." To the contrary, they are inserted for the purpose of showing the breadth and depth of his wrongdoing.

Defendant Totto also objects to many of the strongly stated allegations against him, including those which discuss his "vindictive" investigations, and "grotesque abuse of power." But these allegations are made to justify the award of substantial punitive damages which plaintiff will be seeking against him.

For the reasons stated, plaintiffs respectfully pray that the defendants' motion be denied.

DATED: HONOLULU, HAWAII, November 10, 2016.

KEVIN P. H. SUMIDA
ANTHONY L. WONG
Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA, Plaintiffs, vs. CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission; LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission; HONOLULU ETHICS COMMISSION; and THE CITY AND COUNTY OF HONOLULU, Defendants.	CIVIL NO. 16-1-1166-6 GWBC (Non-Motor Vehicle Tort) CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was duly served on the following attorney(s) by hand delivering same or by placing the same in the United State mail, postage prepaid on this 11th day of November 2016:

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DATED: HONOLULU, HAWAII, November 10, 2016

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LOUIS M. KEALOHA, KATHERINE E. KEALOHA, and KRISTINA KEALOHA, a minor child, by her next friend, KATHERINE E. KEALOHA, Plaintiffs, vs. CHARLES W. TOTTO, individually and as Executive Director and Legal Counsel of the Honolulu Ethics Commission; LETHA A.S. DECAIRES, individually and as investigator for the Honolulu Ethics Commission; HONOLULU ETHICS COMMISSION; and THE CITY AND COUNTY OF HONOLULU, Defendants.	CIVIL NO. 16-1-1166-6 GWBC (Non-Motor Vehicle Tort) **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a true and correct copy of the foregoing document was duly served upon the following parties at their last known addresses, via hand-delivery or via United States mail, postage prepaid:

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DATED: Honolulu, Hawaii, November 15, 2016

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